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Interspousal Tort Immunity in America

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Interspousal tort immunity remains an untidy corner of the law. That rule prohibits husbands and wives from successfully pursuing a civil cause of action against each other for personal injuries. Immunity has a rich and instructive history; it spans Blackstone's enunciation of the unity fiction that women's legal identities merged into their husbands' upon wedlock and the modern women's movement. The immunity doctrine, first recognized in the United States during the 1860s, was maintained intact nationwide for the succeeding half century. But it was abolished by seven jurisdictions between 1914 and 1920, eroded gradually in the ensuing fifty years, and has been transformed dramatically from a majority to a minority rule since 1970.[1]

Despite increasing judicial willingness to abrogate immunity, few courts have analyzed carefully why it should be abolished, and a number of jurisdictions retain the doctrine in whole or in part.[2] Most tort law commentators have denounced the rule since its ini-

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[1] "Rule" and "doctrine" are used synonymously to mean "interspousal tort immunity," which is immunity from suit for interspousal torts inflicted negligently or intentionally. "Abolition" and "abrogation" are employed interchangeably to mean elimination of immunity. "Complete" and "total" are used synonymously to describe abolition and abrogation and mean elimination of both negligence and intentional tort immunity.

[2] The states that appear to retain interspousal tort immunity completely are Delaware and Hawaii. The following states have partial immunity: Arizona, Florida, Georgia, Louisiana, Nevada, and Vermont.

For recent listings of the nationwide status of interspousal tort immunity, see Burns v. Burns, 518 So. 2d 1205, 1211-12 (Miss. 1988); Price v. Price, 732 S.W.2d 316, 319 (Tex. 1987) (citations to cases). *See generally* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 122 (5th ed. 1984).

tial abrogation but have failed to assess incisively either the history of immunity or the reasons for its elimination. Thus, a standard historical treatment developed and a stock litany of arguments favoring abolition has come to be recited. Moreover, the doctrine has not evoked recent scholarly interest; no comprehensive, critical evaluation of immunity has been undertaken in the last quarter century.[3] Nonetheless, there has been burgeoning research, in fields such as women's legal history and feminist jurisprudence, that has important implications for tort immunity. It is appropriate, therefore, to apply this new work to the longstanding doctrine, while exploring the rule's history, reexamining the rationales that underlie the doctrine's continued application and abrogation, analyzing whether immunity should be eliminated fully, and considering the consequences of total abolition.

The first Part of this Article is a review of the origins and development of interspousal tort immunity. It initially examines the legal status accorded women in the United States before 1840 and passage of the Married Women's Property Acts, while discussing the consequences of both for immunity. The century and a quarter of case law then is analyzed by emphasizing evolving currents in judicial decisionmaking, developments in tort jurisprudence and societal views of women, wedlock, wives, and the family, as well as their interrelationships.

Although the question of whether interspousal tort immunity should be abrogated or retained has become today a debate over the public policy reasons for the respective positions, those rationales have their origins in earlier developments. Because the policy concepts now are so significant, but have been accorded inadequate evaluation by judges and writers, Part II of the Article provides an assessment at once more systematic and rigorous. This examination yields the conclusions that, although the arguments favoring abolition are only somewhat more persuasive than those against it, the continued application of immunity serves little useful purpose.

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[3] The last comprehensive, critical piece was Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956). The seminal article was McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930). *See generally* Casenote, *Alone at Last: Oregon Abolishes Interspousal Immunity for Negligent Torts in* Heino v. Harper, 25 WILLAMETTE L. REV. 429 (1989); Comment, *Interspousal Tort Immunity: The Rule Becoming the Exception*, 27 How. L.J. 995 (1984); Note, *Piercing the Marital Veil: Interspousal Tort Immunity After* Harris v. Harris, 36 MERCER L. REV. 1013 (1985).

Accordingly, complete abrogation appears advisable and probable by the year 2000.

The final Part of the Article explores important implications of totally eliminating the rule. This analysis indicates that abolition would vindicate numerous purposes of tort jurisprudence, benefit wives in specific situations, and afford females certain advantages. The evaluation also demonstrates, however, that abrogation may have some adverse impact on the tort law system and is unlikely to increase women's power, improve significantly the conditions of wives, or enhance substantially male-female relations.

I. THE HISTORY OF INTERSPOUSAL TORT IMMUNITY

Interspousal tort immunity has a lengthy and interesting history. This Part descriptively analyzes significant aspects of the rule's history by examining its origins and early relevant developments, wives' legal status in America before 1840, implications of the Married Women's Acts for the doctrine, and case law development in the United States.

A. Origins and Early Developments

The origins of, and nascent developments pertinent to, interspousal tort immunity warrant only brief treatment.[4] At common law unmarried females' legal status was similar to, but somewhat less favored than, that of single males.[5] The women could contract; litigate and be sued; own, manage and convey realty and personalty; and were entitled to the fruits of their labor and income derived from their property.[6] Marriage drastically altered the legal status of women, however. Upon wedlock, husbands acquired possessory rights to their wives' property and could use its rents and

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[4] This section briefly summarizes the common-law origins of interspousal tort immunity. For a more thorough treatment, see generally W. PROSSER & W.P. KEETON, *supra* note 2, § 122; McCurdy, *supra* note 3.

[5] *See* L. KANOWITZ, WOMEN AND THE LAW 35 (1969); Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1045 (1972). This was true in both mid-nineteenth century England, *see* J. WHARTON, AN EXPOSITION OF THE LAWS RELATING TO THE WOMEN OF ENGLAND 173 (1853), and mid-nineteenth century America, *see* Walker, *The Legal Condition of Women*, in THE GOLDEN AGE OF AMERICAN LAW 317 (C. Haar ed. 1965).

[6] *See* H. CLARK, DOMESTIC RELATIONS CASES AND PROBLEMS 57, 725 (3d ed. 1980); L. KANOWITZ, *supra* note 5, at 35; Johnston, *supra* note 5, at 1045.

profits.[7] A married man also was entitled to his spouse's chattels and earnings as well as her choses in action, which became the husband's personalty once reduced to possession.[8] Moreover, married women, in their own names, could not contract, file claims or be sued, or transfer real property.[9] Although some exceptions to these incapacities developed in England and colonial America, principally through equity, the disabilities imposed at law remained substantial.[10]

Numerous practical and theoretical explanations exist for the common law's relegation of women to this legal status upon marriage. One idea derived from Roman law is the position occupied by the *pater-familias*, who as head of the family exercised almost absolute control over its members.[11] Other explanations, feudal in

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[7] *See* Griswold v. Penniman, 2 Conn. 564, 565 (1818) (holding that possession of estate vested in intestate heir's husband); Beale v. Knowles, 45 Me. 479 (1858) (holding conveyance by wife void); Mattocks v. Stearns, 9 Vt. 326, 335 (1837) (holding that husband's interest in wife's estate could satisfy creditor's claims); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 860 (4th ed. 1971); McCurdy, *supra* note 3, at 1031.

[8] *See* Bell v. Bell, 1 Ga. 637, 640 (1846) (holding that wife was entitled in equity to what the husband had not reduced to his possession); Wells v. Tyler, 25 N.H. 340, 342 (1852) (holding that husband might reduce wife's bequest to his possession); Ritter v. Ritter, 31 Pa. 396, 399 (1858) (holding that wife could not maintain debt action against husband); W. PROSSER, *supra* note 7, § 122, at 860.

[9] *See* Anderson v. Anderson, 74 Ky. 327, 330 (1875) (holding that wife could not maintain battery action without husband); Concord Bank v. Bellis, 64 Mass. 276, 277 (1852) (holding that wife could not mortgage land); Manby v. Scott, 86 Eng. Rep. 781, 783 (1663) (holding husband not liable to pay for goods for which wife had no right to contract); W. PROSSER, *supra* note 7, § 122, at 859. For a discussion of the legal status of English wives throughout history, see N. BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK 17-22, 27 (1982) (legal status of wives in England better before the common law thus contravening "theories that locate the changing legal status of married women on a path of steady improvement"); A. OAKLEY, WOMAN'S WORK 28-30 (1974); W. O'NEILL, THE WOMAN MOVEMENT 17 (1969). *Cf.* Minow, *"Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 820 (traditional American family law historians describe evolution of family law as progression from patriarchal to egalitarian family whose members individually enjoy rights protected by the state, but author advocates peering beneath traditional view by exploring social experience rather than law on the books).

[10] For a discussion of the separate estate, a typical equitable device, see M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 81-140 (1986). For more discussion of equity, see N. BASCH, *supra* note 9, at 20-21, 72-74; L. KANOWITZ, *supra* note 5, at 38-39. For more discussion of disabilities imposed at law, see M. BEARD, WOMAN AS FORCE IN HISTORY 92-95 (1946); P. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 25-30 (1980).

[11] *See* McCurdy, *supra* note 3, at 1035. For further discussion of the concept of the *pater-familias*, see M. RADIN, HANDBOOK OF ROMAN LAW §§ 38, 40 (1927); Hollister, *Parent-Child*

origin, include the notion of "natural male dominance"[12] and the character of feudal tenures, the "chief duties of which, suit and service, were by their nature not readily performed except by men."[13] The superior physical strength possessed by husbands is proffered,[14] as is the idea that a woman upon marriage became her spouse's property, if not his slave.[15] Marriage also is said to have been a unique type of contract, not governed by the rules that ordinarily apply to such instruments, but one which invariably benefited the superior party to the agreement—the husband.[16] Several prominent commentators have contended that the concept of guardianship is most accurate.[17]

But the most influential reason, premised partially on the Biblical notion that wedded individuals are "one flesh,"[18] is that the female's legal identity merges into the male's upon marriage.[19]

Immunity: A Doctrine in Search of Justification, 50 FORDHAM L. REV. 489, 490-91 (1982).

[12] *See* M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 524 (1936). *Accord* 1 J. BISHOP, LAW OF MARRIED WOMEN § 47 (1875). *Cf.* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (concluding that "Man is, or should be, woman's protector and defender.").

[13] M. RADIN, THE COMMON LAW OF THE FAMILY, VI NATIONAL LAW LIBRARY, LEGAL RELATIONS 177 (1939). *Accord* N. BASCH, *supra* note 9, at 17; P. RABKIN, *supra* note 10, at 19-20.

[14] *See* Bentham, *Principles of the Civil Code*, in 1 WORKS OF JEREMY BENTHAM 355-56 (J. Bowring ed. 1838), *reprinted in* Johnston, *supra* note 5, at 1048-49; Mill, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS 194 (E. Neff ed. 1936), *reprinted in* Johnston, *supra* note 5, at 1051; McCurdy, *supra* note 3, at 1035. *Cf.* Muller v. Oregon, 208 U.S. 412, 420-23 (1908) (treating women's physical weakness as premise for upholding "special treatment" legislation).

[15] *See* N. BASCH, *supra* note 9, at 37-38; Johnston, *supra* note 5, at 1051. *Cf.* Tinker v. Colwell, 193 U.S. 473, 485 (1904); Crowell v. Crowell, 180 N.C. 516, 522, 105 S.E. 206, 210 (1920) (judicial articulation of notion that wives were husbands' property).

[16] *See* Johnston, *supra* note 5, at 1047-48. For a discussion of marriage as a contract, see B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 561-66 (1975) [hereinafter B. BABCOCK]; L. WEITZMAN, THE MARRIAGE CONTRACT xix-xxi (1981). *Cf.* Maynard v. Hill, 125 U.S. 190, 210-14 (1888) (stating that marriage is more than mere contract; rights and obligations depend upon law, not agreement of the parties).

[17] *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 435 (2d ed. 1903); Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 346-47 (1949); Williams, *The Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16, 18 (1947). *Cf.* Abbott v. Abbott, 67 Me. 304, 307 (1877) (husband as guardian may put "gentle restraints" upon wife's liberty), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980).

[18] *See* Johnston, *supra* note 5, at 1046; McCurdy, *supra* note 3, at 1035; Williams, *supra* note 17, at 16-18. *Cf.* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (Bradley, J., concurring) (common-law maxim that woman "had no legal existence separate from her husband"); M. DALY, THE CHURCH AND THE SECOND SEX 74-84 (1968) (Biblical origins of notion).

[19] *See* Thompson v. Thompson, 218 U.S. 611, 614-16 (1910) (Harlan, J., dissenting); McCurdy, *supra* note 3, at 1035; Williams, *supra* note 17, at 16-17. *Cf.* Carroll v. Reidy, 5 App.

This idea is captured best by William Blackstone in his eighteenth century *Commentaries on the Laws of England*: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection, and cover, she performs everything."[20] Thus, the unity notion, and Blackstone's enunciation of it, could be described most accurately only as maxims or fictions created to justify and perpetuate the status quo and power relationships within the eighteenth century English family.[21] Although a "general theory that will fully account for the common law system" has yet to be formulated,[22] the merger idea and Blackstone's articulation were crucial in conceptualizing wives' legal status for the purpose of treating interspousal tort immunity until the early twentieth century.[23]

The notion of the single identity of a wedded man and woman had both substantive and procedural implications for potential interspousal personal injury litigation, suits which were unknown at common law.[24] Unitary legal status prevented one spouse from acquiring a tort cause of action against the other for harm perpetrated.[25] Even if a claim could have been stated, the husband

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D.C. 59, 62 (D.C. Cir. 1894) (merger was feudal notion).

[20] 1 W. BLACKSTONE, COMMENTARIES *442, *reprinted in* W. PROSSER, *supra* note 7, § 122, at 859. For an oft-cited, remarkably similar yet considerably earlier articulation of this idea, see THE LAWES RESOLUTIONS OF WOMENS RIGHTS (1632), *reprinted in* M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 94-95 (1976).

[21] *See* N. BASCH, *supra* note 9, at 43-54; D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (1941); Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1385-89 (1983). *Cf.* L. FULLER, LEGAL FICTIONS 3 (1967) (discussion of Blackstone's use of legal fictions).

[22] Johnston, *supra* note 5, at 1051.

[23] *See infra* notes 125-30 and accompanying text. For additional discussion of Blackstone and his effect on the development of American law, see N. BASCH, *supra* note 9, at 43-54; M. BEARD, *supra* note 10, at 78-121; Chused, *supra* note 21, at 1385-89; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). *See also* Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L. J. 795 (1988).

[24] *See* Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L.J. 697, 704 (1939).

[25] *See* Abbott v. Abbott, 67 Me. 304, 306 (1877) (holding that "real substantial ground" for refusing to permit wife to sue husband was "general principle of the common law that husband and wife are one person"), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Austin v. Austin, 136 Miss. 61, 69-70, 100 So. 591, 592 (1924); Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911) (holding wife could not maintain action against husband for communicating venereal disease to her), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984); Phil-

would have been plaintiff as well as defendant in any litigation pursued.[26] Thus, at early common law, the

> combination of the various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor, in any situation, and without exception, to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage.[27]

In 1876, the Queen's Bench affirmed the validity of the common-law immunity concept and thereby ensured its modern-day application in England.[28]

B. American Developments

1. Before 1840. Variations within and among colonies and states, as well as between those entities and England, complicate generalization about wives' legal status in America prior to 1840.[29] Yet

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lips v. Barnet, 1 Q.B.D. 436, 438 (1876) (concluding wife could not maintain assault action against husband).

[26] *See Abbott*, 67 Me. at 308; W. PROSSER, *supra* note 7, § 122, at 860; *accord* McCurdy, *supra* note 3, at 1033.

[27] McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 307 (1959). *Accord* 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 8.10, 562 (1986) [hereinafter F. HARPER]. *Cf.* Heino v. Harper, 306 Or. 347, 353, 759 P.2d 253, 256 (1988) (unclear whether real impediment to interspousal tort actions at common law was substantive or procedural).

[28] *Phillips*, 1 Q.B.D. at 438. For discussions of interspousal immunity's subsequent history in England, see S. ATKINS & B. HOGGETT, WOMEN AND THE LAW 132-46 (1984); Williams, *supra* note 17, at 26-27.

[29] *See* N. BASCH, *supra* note 9, at 22; M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 5 (1985); M. SALMON, *supra* note 10, at 3-13. These and other recent works enhance the ability to generalize, especially with respect to the period from 1780 to 1840. But more work is needed on the earlier period, particularly the seventeenth century, before generalizations can be drawn with confidence. *Cf.* Chused, *supra* note 21, at 1360 n.2, 1385 n.102; Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 129 (1983) (both present valuable suggestions for more research).

The analysis of families and wives' legal status during this period and through 1900 principally treats whites, the upper and middle classes, and nonimmigrants. *Cf.* M. BLOOMFIELD, *supra* note 20, at 122-35; J. TEN BROEK, FAMILY LAW AND THE POOR (J. Handler ed. 1964) (the poor); E. FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH (1988); E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976) (blacks); J. JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985) (blacks); Minow, *supra* note 9,

more informed accounts than have been postulated can be afforded.

a. The Colonial Period. The traditional historical view[30] describes the legal status enjoyed by colonial married women, especially in commercial contexts, as considerably better than that of English wives, a circumstance attributable primarily to burgeoning commercial activity in the New World.[31] For example, American wedded females were said to have greater freedom to convey real property and to contract than their counterparts in the mother country.[32] It also has been asserted that the different social and economic conditions that prevailed in the New World rendered obsolete the "concept of the unity of husband and wife in marriage to form one legal personality."[33] The traditional perspective holds that the "individual status of the married woman in the law of lia-

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at 862-77 (working and working-class women); Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 62-64 (1987) (problems entailed in attempting to speak from one perspective for all women).

I realize that legal status comprised little of wives' experience, especially given the status they were afforded, and that the story of that status reads like a march of progress from patriarchal domination to enjoyment of individual rights. Thus, I have tried to treat somewhat women's social and economic status by drawing on recent work on women's history, much of which is controversial. *See, e.g., infra* note 49. I have also attempted to account for variability, gaps, and departures from the traditional views of these issues. Moreover, I appreciate that the realities of women's experience could challenge both legal status and accepted images of social and economic status. I understand as well that any effort to survey such a long period for clues about tort immunity involves numerous subtle and complex issues of law, society, and historiography. Furthermore, I am not necessarily adopting the account provided, but trying to tailor it to tort immunity to best capture what is expressed in the judicial articulations of this idea. For a recent valuable analysis of many issues of historiography and other difficult questions raised above in the context of family law history, see Minow, *supra* note 9.

[30] R. MORRIS, STUDY AND HISTORY OF AMERICAN LAW 126-200 (2d ed. 1959), was widely accepted as the definitive work on wives' legal status in colonial America during the half-century following its 1930 publication. *See* Salmon, *supra* note 29. Recent historical research questions many of Morris' conclusions, although debate is ongoing and controversial. *See infra* notes 36 & 49 and accompanying text.

[31] R. MORRIS, *supra* note 30, at 128-29.

[32] *Id.* at 128-29, 175-76. *Accord* G. LERNER, THE WOMAN IN AMERICAN HISTORY 13-14 (1971).

[33] See R. MORRIS, *supra* note 30, at 129. *Cf.* N. BASCH, *supra* note 9, at 69 ("metaphor of enormous power" that survived "dislocations of colonization and revolution . . . to penetrate nineteenth century American thought"); M. SALMON, *supra* note 10, at 14 (unity represented little more than ideal in Anglo-American law and as legal concept underwent almost continual change in seventeenth and eighteenth centuries).

bility" increasingly was recognized,[34] although the "rights and liabilities in tort of the colonial woman followed upon her proprietary and contractual rights, and at a much slower pace."[35] Recent historical research, however, questions the validity of these perspectives, especially their general and overly optimistic nature and the failure to consider thoroughly geographic or temporal variations.[36]

The following account now appears more accurate. Married women were somewhat less constrained at the beginning of the colonial period.[37] "Early variations in colonial practice and different traditions in colonial administration left opportunities open for novel American practices to develop,"[38] especially in specific locales, during particular periods, as to the various indicia of coverture, and at equity.[39] Few colonies permitted husbands to give their spouses "moderate correction" or to administer "domestic chastisement."[40] Most American courts would have protected in-

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[34] R. MORRIS, *supra* note 30, at 197. This assertion is premised on an early, but essentially inconclusive, colonial case.

[35] *Id.* at 185.

[36] *See* N. BASCH, *supra* note 9, at 22-25; Chused, *supra* note 21, at 1391 n.155; Norton, *The Evolution of White Women's Experience in Early America*, 89 AM. HIST. REV. 593 (1984); Salmon, *supra* note 29. *Cf.* M. SALMON, *supra* note 10, at 3-13 (helpful background discussion); Minow, *supra* note 9, at 865 (need to consider familial variability and social roles of wives, which indicate wives had more power in certain contexts and family was not patriarchal enclave).

[37] *See* N. BASCH, *supra* note 9, at 23-24; L. FRIEDMAN, A HISTORY OF AMERICAN LAW 185 (1973); Chused, *supra* note 21, at 1389-90; Johnston, *supra* note 5, at 1058-59.

[38] Chused, *supra* note 21, at 1390. *Accord* N. BASCH, *supra* note 9, at 23-24.

[39] The best treatment of geographic and temporal variability is M. SALMON, *supra* note 10, at 3-13. For discussion of the indicia of property, contract, and others, see N. BASCH, *supra* note 9, at 15-112; M. SALMON, *supra* note 10, at 14-57; Chused, *supra* note 21. Equity concepts that developed as exceptions to the unity idea and permitted women "to own, manage, convey, and devise property represented a radical breakthrough for women." M. SALMON, *supra* note 10, at 81. But the use of equity had certain limitations. For example, because equity rules were supervised by equity courts and never defined by statute they were inaccessible to most women. *Cf. id.* at 81-184 (full discussion of equity); Minow, *supra* note 9, at 858-59 (need for more research on equity).

[40] Blackstone stated that the "old common law" permitted a husband to restrain his wife by domestic chastisement and to give her moderate correction but that in the "reign of Charles the Second, this power of correction began to be doubted," and she could in 1770 "have security of the peace against her husband." 1 W. BLACKSTONE, COMMENTARIES *443-45. Moreover, a 1641 Massachusetts statute provided that "[e]very married woman shall be free from bodily correction or stirpes by her husband." S. SPEISER, C. KRAUSE & A. GANS, 2 THE AMERICAN LAW OF TORTS § 6:44, at 215 n.84 (1985). *Cf.* E. PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 21-27 (1987) (discussing that statute and other legislation against family vio-

tentionally injured wives, at least when they suffered severe harm or when their husbands seriously misbehaved.[41]

Nevertheless, the married woman's legal status was not "miraculously transformed when it crossed the Atlantic."[42] Colonial America generally followed English common law,[43] and the law respecting married women apparently was one of the areas least altered.[44] More specifically, the "traditional English pattern of the husband's dominance certainly governed in most places during the late seventeenth and the greater part of the eighteenth century."[45] The mother country's "common law model of marital property, along with its ameliorating exceptions, did take root, grow and flourish until it eventually crowded out most informal non-English practices" in the New World.[46] A married man also was entitled to impose restraints on his spouse's liberty, a "right" with which colonial judges were reluctant to interfere.[47] These factors as well as the substantive and procedural disabilities under which married

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lence). *But cf. infra* note 47 and accompanying text (husband's right to impose "gentle restraint" and other conflicting ideas).

[41] One writer has observed that "should the colonial man be so foolhardly as to deal brutally with his wife the colonial court would interfere in woman's behalf." M. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 43 (1975). *Accord* S. BOTEIN, EARLY AMERICAN LAW AND SOCIETY 42 (1983). *Cf.* M. SALMON, *supra* note 10, at 77 (when husband so cruel that wife forced to leave home, courts required husband to support her in living elsewhere). *But cf. infra* note 47 and accompanying text (right to impose restraints on spouse's liberty).

[42] N. BASCH, *supra* note 9, at 22. *Accord* Johnston, *supra* note 5, at 1059.

[43] *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 4-9 (1977); Chused, *supra* note 21, at 1389 n.139 and accompanying text, 1385 n.102 and accompanying text, and 1391-92; Johnston, *supra* note 5, at 1058 n.103 and accompanying text.

[44] *See* 1 J. BISHOP, *supra* note 12, at § I, *reprinted in* Johnston, *supra* note 5; J. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 1-2 (1946).

[45] Chused, *supra* note 21, at 1390. *Accord* N. BASCH, *supra* note 9, at 22-23; M. BLOOMFIELD, *supra* note 20, at 97; M. NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN 1750-1800, at 50, 61-65 (1980); W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760-1830, at 103 (1975); Johnston, *supra* note 5, at 1058-59.

[46] N. BASCH, *supra* note 9, at 22-23. *Accord* Johnston, *supra* note 5, at 1059.

[47] Colonial "judges were reluctant to intervene in family affairs, even to protect a wife or child from physical abuse." M. BLOOMFIELD, *supra* note 20, at 97. *Cf.* 2 J. KENT, COMMENTARIES ON AMERICAN LAW *181 (12th ed. 1896) (recognition of husband's right to impose "gentle restraints" on wife's liberty); 1 WHARTON'S CRIMINAL LAW 1120 (12th ed. 1932) (references in common law survey to right of chastisement and to criminal prosecution only of husbands who were guilty of malignant cruelty or permanently injuring wives). Much more work must be done before it will be possible to say with certainty what relief was available to a colonial wife abused physically by her husband.

females labored made it quite improbable that an American court would have recognized a wife's tort suit against her husband.[48]

b. From Independence to 1840. Although it might seem that the American Revolution, "which unleashed an aggressively egalitarian ideology antithetical to the very concept of coverture," should have created a favorable climate for enlarging the freedom of women, wives' rights actually were not significantly expanded after Independence.[49] Separation from Britain directly caused "only a few changes," and these were "gradual, conservative, and frequently based upon English developments"; the merger idea survived the Revolution essentially intact.[50] Thus, at the turn of the century, the legal status of married women was improved little over that enjoyed considerably earlier. For instance, husbands were entitled to their spouses' personal property once reduced to possession, as well as to the control and management of wives' realty held in a legal estate.[51]

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[48] None of the sources consulted above states that interspousal tort litigation was attempted. Moreover, one writer who comprehensively analyzed the question has observed that such actions were "unknown at common law," a factor attributable to the "fiction of unity" and the "impossibility of the same person being both plaintiff and defendant in the same suit." Haglund, *supra* note 24, at 704. It is important to remember that a wife's social and economic status and her position in the family may have been better than her legal status, and the family environment was probably less patriarchal than previously thought. *See* J. DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 94-95 (1970); L. ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750, at 35-50 (1982); Minow, *supra* note 9, at 852-65. These views remain controversial, however. *See, e.g.*, Minow, *supra* note 9, at 828 n.24.

[49] N. BASCH, *supra* note 9, at 25. *Accord* M. BLOOMFIELD, *supra* note 20, at 104; L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 9-10, 115-55 (1980); W. NELSON, *supra* note 45, at 103. Indeed much said above respecting colonial wives' legal status applies to the period between 1776 and 1840, including the difficulty of drawing definitive conclusions. One complication is attempting to treat such a long, important period of American history. Another is that after 1815, the situation of women depended in part on where they lived. *See* G. LERNER, *supra* note 32, at 54. There is much helpful recent research, such as N. BASCH, *supra* note 9; M. SALMON, *supra* note 10; Chused, *supra* note 21. Much of the work is revisionist and contradictory.

[50] *See* N. BASCH, *supra* note 9, at 24; L. KERBER, *supra* note 49, at 10 (merger intact); Salmon, *"Life, Liberty, and Dower": The Legal Status of Women After the American Revolution* in WOMEN, WAR, AND REVOLUTION 86, 87, 99-100 (C. Berkin & C. Lovett eds. 1980) (quoted ideas). *Cf.* M. SALMON, *supra* note 10, at xv, 118, 191 (finding the "law became more willing to grant women independent rights to property"); Minow, *supra* note 9, at 858-59 (world of legal practices in early republic period more fluid than recitation of Blackstone would suggest).

[51] *See* Chused, *supra* note 21, at 1361. *Accord* N. BASCH, *supra* note 9, at 26-27; W. NELSON, *supra* note 45, at 104. It would be unfair, however, to characterize wives' legal status as

From 1800 to 1840, however, certain changes in the legal status of married women did occur. "The legal separateness of the wife in specific situations was sharpened somewhat in both statutes and judicial decisions," and a number of norms which had economic effects on married women were altered.[52] "Several reforms, including the liberalization of inheritance rules and divorce laws and the enlargement of benefits for widows and abandoned women, appeared in the early decades of the nineteenth century."[53] Moreover, quite a few jurisdictions explicitly limited the husband's right to administer domestic chastisement.[54]

Nonetheless, wives' legal status was not enhanced markedly during the four decades. Most judges and commentators continued to treat married females as if their legal identities remained merged with their husbands', reflecting Blackstone's influence.[55] A revealing illustration was Justice Story's pronouncement in the 1819 Dartmouth College case:[56] a "man has as good a right to his wife as

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"declining" between 1780 and 1800. There were some slow, subtle improvements. *See supra* note 50. Moreover, women's status within society and the family seems to have improved. *See* S. LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN 1784-1860 (1984); M. NORTON, *supra* note 45, at 228-94; E. PLECK, *supra* note 40, at 34-48; M. SALMON, *supra* note 10, at 118, 191. *Cf.* Minow, *supra* note 9, at 852-65 (women's status appears improved but in reality the colonial period was better than previously thought). For a discussion of "Republican Motherhood," which has been used to characterize wives between 1780 and 1800, see N. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND 1780-1835, at 104-06, 147-48 (1977); L. KERBER, *supra* note 49; M. NORTON, *supra* note 45, at 228-94. *Cf.* M. GROSSBERG, *supra* note 29, 3-31 (the "Republican Family," legal order, and law of domestic relations). *See generally* L. FRIEDMAN, *supra* note 37, at 93-98 (discussing English laws' reception during period).

[52] N. BASCH, *supra* note 9, at 25. *Accord* M. GROSSBERG, *supra* note 29, at 24-27. For discussion of numerous norms that affected wives, see Chused, *supra* note 21.

[53] Chused, *supra* note 21, at 1361, 1397. *Accord* N. BASCH, *supra* note 9, at 25-26; W. NELSON, *supra* note 45, at 103-04; M. SALMON, *supra* note 10, at 58-184.

[54] See Bradley v. State, 1 Miss. 156, 158 (1824) (holding husband must show chastisement confined to reasonable bounds to evade liability to wife). *See also* Fulgham v. State, 46 Ala. 143, 147 (1871) (concluding husband may exercise "gentle restraint" but "barbarous custom" of "wife whipping" not state law); T. REEVE, THE LAW OF BARON AND FEMME 65 (1st ed. 1816) ("the right of chastising a wife is not claimed by any man" in Connecticut). Developments in adoption and child custody were also said to herald the emergence of a modern American family law during this period. *See* M. GROSSBERG, *supra* note 29, at 234-85; Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1084-89 (1979).

[55] For discussion of merger, its strength and resilience, and Blackstone's influence upon it, see *supra* notes 18-23 and accompanying text. For more on merger and for analysis of the views of most of the authorities discussed below, see N. BASCH, *supra* note 9, at 15-69.

[56] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

to the property acquired under a marriage contract. He has a legal right to her society and her future."[57] Other legal figures, writing contemporaneously and as late as the 1840s, agreed with Story's views and essentially recognized patriarchal arrangements, if not unity.[58] Chancellor Kent, in his celebrated *Commentaries on American Law*, stated that a wedded male was afforded "reasonable superiority and control over" his spouse's person and might "put gentle restraints upon her liberty."[59] Courts in some jurisdictions expressly subscribed to these propositions,[60] while judges in a few states even refused to punish men who practiced domestic chastisement.[61] Most telling, however, is Tapping Reeve's observation in the initial, indigenous legal treatise on marriage, *The Law of Baron and Femme*: The "nature of the connexion between [husband and wife is] such that no [battery] can give either a right of action to recover damages."[62]

These considerations, especially the strength and resilience of the merger fiction and the substantial disabilities imposed upon wedded females, probably explain the absence of a single reported case in which an American court was asked to permit an interspousal tort suit throughout the forty years.[63] Commencing around

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[57] *Id.* at 596-97. The pronouncement is particularly telling, given Justice Story's eminence as a jurist and writer. For a valuable biography, see R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

[58] *See, e.g.*, E. MANSFIELD, THE LEGAL RIGHTS, LIABILITIES AND DUTIES OF WOMEN (1845); Walker, *supra* note 5, at 318-20. For additional discussion of these writers and others, see N. BASCH, *supra* note 9, at 43-54; M. GROSSBERG, *supra* note 29, at 3-31. *But cf.* Minow, *supra* note 9, at 842 n.84 (questioning what legal fiction meant to wives in daily lives).

[59] J. KENT, *supra* note 47, at *181. The Commentaries were written in the 1820s. *Cf.* N. BASCH, *supra* note 9, at 60-69 (discussion of Kent's treatment of wives).

[60] *See* Barber v. Barber, 62 U.S. (21 How.) 582, 589 (1858) (noting that, except in divorce cases, wife cannot bring lawsuit unless joined with husband because "she is deemed to be under the protection of her husband"); cases cited in N. BASCH, *supra* note 9, at 219; W. NELSON, *supra* note 45, at 103-04.

[61] The case most often cited for this proposition is State v. Rhodes, 61 N.C. 453, 456-57 (1868) (state will not interfere with husband's moderate correction of wife even if there had been no provocation for it), *modified*, State v. Oliver, 70 N.C. 60, 61 (1874) ("husband has no right to chastise his wife under any circumstances"). *But cf. supra* note 54 and accompanying text (states rejecting idea); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177 n.8 (1982) (most states repudiated chastisement but refused to entertain routine assault cases).

[62] T. REEVE, *supra* note 54, at 65. *Cf.* N. BASCH, *supra* note 9, at 57-60 (analysis of wives' treatment in Reeve's treatise).

[63] The first reported case seems to be Longendyke v. Longendyke, 44 Barb. 366, 367-70 (N.Y. 1863) (wife sought to maintain assault action against husband based on Married

1840, however, a complex mix of factors led to the passage of Married Women's Property Acts. These measures were enacted in every jurisdiction by approximately 1875,[64] and this development had significant implications for interspousal tort immunity.[65]

Women's Property Act). *Accord* Haglund, *supra* note 24, at 704 ("no adjudicated precedent" until "married women's acts . . . generally enacted" because of merger fiction and impossibility of same person being plaintiff and defendant in same suit). *Cf.* Abbott v. Abbott, 67 Me. 304, 308-09 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); *supra* notes 24-26 and accompanying text (substantive and procedural disabilities under which wives labored until Acts' passage). It is also possible that there were unreported, unappealed adverse trial court decisions or settlements.

[64] *See* N. BASCH, *supra* note 9, at 27-28; M. BLOOMFIELD, *supra* note 20, at 117; Chused, *supra* note 21, at 1398. Professor Chused observes that the "acts began to appear in 1835," but he considers 1840 as an appropriate "approximation of the beginning of a transition period." *Id.* at 1361 n.3. *See generally id.* at 1398 n.204 (helpful suggestions for working with Acts).

[65] It is very difficult to generalize briefly about societal views of women, marriage, wives, and the family for such a long, complex, and important period as 1800 to 1840. For helpful, concise discussions, see N. BASCH, *supra* note 9, at 29-41; Chused, *supra* note 21, at 1412-23. *See generally* M. GROSSBERG, *supra* note 29, M. SALMON, *supra* note 10; Minow, *supra* note 9, at 866-84 (fuller treatment).

During the late eighteenth century, women fashioned the notion of Republican Motherhood, marriage became somewhat more companionate and less hierarchical, and females' social status improved somewhat. *See supra* note 51. Moreover, when industrial capitalism forced production out of homes between 1800 and 1850, wives' special roles were "intensified, sentimentalized, and transformed into the cult of domesticity," whereby women occupied lofty spheres that were "complementary to but clearly separate from the world of men" in which they redefined and expanded their roles. N. BASCH, *supra* note 9, at 40, 30. *Accord* M. SALMON, *supra* note 10, at 191. *But see* Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson*, 10 MIDCONTINENT A. STUD. J. 5-15 (1969) (women's status declined). For additional discussion of the cult of domesticity, see A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977); Welter, *The Cult of True Womanhood: 1800-1860*, in B. WELTER, DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY 21-41 (1976). For discussion of the separate sphere ideology, see C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 26-65 (1980); K. O'DONOVAN, SEXUAL DIVISIONS IN LAW 59-158 (1985). *Cf.* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (reform efforts to help women limited by separate spheres of market and family); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 70-78 (legal recognition of public and private spheres). For more discussion of how women redefined and expanded their roles, see N. COTT, *supra* note 51; Smith-Rosenberg, *Beauty, the Beast and the Militant Woman: A Case Study in Sex Roles and Social Stress in Jacksonian America*, 23 AM. Q. 562 (1971). *Cf.* A. KOLODNY, THE LAND BEFORE HER: FANTASY AND EXPERIENCE OF THE AMERICAN FRONTIERS, 1630-1860 (1984) (frontier women's experience at odds with cult of domesticity and separate spheres); Minow, *supra* note 9, at 869 (working women's experience at odds with cult of domesticity and separate spheres). For a discussion of the transition from Republican Motherhood to the cult of domesticity, see M. RYAN, *supra* note 41, at 139-91. The period between 1830 and 1840 has also been described as one of "extraordinary ferment," characterized by a "generalized reform spirit," in which some

2. After 1840.

a. The Married Women's Property Acts. The Married Women's statutes were important because they provided a basis for recognizing personal injury actions between husbands and wives. The typical legislation authorized a married woman to "maintain an action in her own name, for damages, against any person . . . for any injury to her person or character, the same as if she were sole."[66] The statutes, therefore, made it plausible to contend that coverture had been destroyed and independent legal status bestowed or, at least, that common-law disabilities had been removed or indicia of legal personality provided, so that interspousal tort litigation should be permitted.[67] Consequently, during the 1860s, the attorneys who filed the initial cases seeking recognition of wives' tort suits against husbands seized upon the statutes. Indeed, the measures figured prominently in nearly every judicial determination regarding immunity until the mid-twentieth century.[68] Thus, it is important to analyze carefully the enactments because of the implications they had for interspousal tort immunity.[69]

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women participated, especially through religious organizations, in such activities as abolition of slavery. W. O'NEILL, *supra* note 9, at 18-21. *Accord* W. CHAFE, WOMEN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE 24 (1977); C. CLINTON, THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH-CENTURY 166-87 (1984); W. LEACH, TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY (1980); Minow, *supra* note 9, at 877-84 (women applied ethos of caring in public sphere through voluntary activities).

[66] The quoted language is in an 1862 amendment to the New York Married Women's legislation and was relied upon by an attorney who brought one of the first cases seeking recognition of an interspousal tort cause of action. *See* N.Y. Laws of 1862, ch. 172, § 3, *quoted in* Freethy v. Freethy, 42 Barb. 641, 642 (N.Y. 1865).

[67] *See Freethy*, 42 Barb. at 642.

[68] Modern courts generally do not treat the legislation as dispositive, although some rely on it. *See, e.g.*, Townsend v. Townsend, 708 S.W.2d 646, 647-50 (Mo. 1986) (discussing "overdue recognition that . . . General Assembly attempted to abrogate this common law doctrine in the Married Women's Act"); Hack v. Hack, 495 Pa. 300, 306-10, 433 A.2d 859, 862-64 (1981) (concluding that words "separate property" within Married Persons Property Act provided claim for tort damages).

[69] This task is complex and controversial because the reforms effected by the Acts were mammoth in scope, diverse in origins and purpose, and extended over space and time. Consequently, a comprehensive analysis has not yet been performed. Moreover, prior research has engendered confusion. Some observers viewed the Acts as instigated by women's rights advocates for the purpose of modifying coverture. These perspectives now seem inaccurate, especially in light of recent work. *See, e.g.*, N. BASCH, *supra* note 9, at 113-99; P. RABKIN, *supra* note 10, at 52-99; Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution*, in 2 WOMEN AND THE LAW 69 (D. Weisberg ed. 1982); Chused, *supra* note 21; Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J.

The statutes were passed in at least three waves, which occurred at different times for numerous, changing reasons and at the behest of shifting, diverse interests. The measures included varying language both within and among states and were amended continuously, even as late as the twentieth century.[70] Most Acts modified one or more specific incidents of wives' legal status, but very few enactments simultaneously changed a substantial number of indicia.[71]

It is difficult to determine from the phraseology in most statutes, even when all of the amendments in a jurisdiction are considered together, exactly what implications the legislation had for immunity. The wording of the measures varied, but most statutes specifically protected wives' property from their spouses' creditors and wives' earnings from their husbands. The enactments also provided wives with independent ownership of and control over their property, permitted wives to contract, and enabled them to litigate and be sued without joining their spouses. The language of the New Hampshire statute is typical:

> Every woman shall hold to her own use, free from the interference or control of any husband she may have, all property at any time earned, acquired or inherited by, bequeathed, given or conveyed to her, either before or after marriage. . . . Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her

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LEGAL HIST. 3 (1985); Johnston, *supra* note 5, at 1061-69. *Cf.* E. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861 (1987) (recent issuance of valuable 1960 doctoral thesis on married women's property rights).

[70] *See* Johnston, *supra* note 5, at 1061-92. "The process was piecemeal and erratic; it was also progressive and irreversible." M. BLOOMFIELD, *supra* note 20, at 117.

[71] A state legislature might first attempt to free wives' estates from their spouses' debts; four years later to establish separate estates for wives; six years later to speak to proscriptions upon wives conveying property; eleven years later to adopt other provisos pertaining to wives' property; fourteen years later to treat their earnings or contracts; and twenty years after first legislating in the area, to provide for wives' litigation. For example, the Connecticut legislature initially adopted a Married Women's Property Act in 1845 and amended it ten times during the ensuing 22 years. Not until 1877 were wives afforded complete dominion over their property. *See* Johnston, *supra* note 5, at 1067-68 (description of Connecticut's Act); *cf.* Speth, *supra* note 69, at 47 (descriptions of other states' Act). Moreover, there was an astounding lack of cross-jurisdictional uniformity; indeed, "it was extremely unlikely at anytime during the period of reform that any two states shared exactly the same law." Johnston, *supra* note 5, at 1062; *accord* Chused, *supra* note 21, at 1398.

> own right, as if she were unmarried and may convey, make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried.[72]

Some legislation specifically mentioned litigation between husbands and wives. For example, the South Carolina measure explicitly prescribed interspousal claims: "A married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone."[73] The Hawaii enactment, in contrast, proscribed interspousal actions: "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."[74]

Quite a few statutes permitted personal injury litigation by wedded females, as the Maryland measure illustrates: "Married women shall have power [to sue] for torts committed against them, as fully as if they were unmarried . . ."[75] But no legislation, as originally passed or even as amended until the twentieth century, specifically provided both for personal injury actions and for such suits between husbands and wives.[76]

The Acts' imprecise phraseology and the paucity of legislative history, such as committee reports or floor debates, that accompanied the statutes' enactment,[77] make it difficult to discern whether legislatures intended to alter immunity. Most legislators probably

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[72] N.H. REV. STAT. ANN. § 460:1,2 (1983).

[73] S.C. CODE ANN. § 15-5-170 (Law. Co-op. 1977).

[74] HAW. REV. STAT. § 573-5 (1985), *repealed by* L. 1987, c. 46, § 4.

[75] MD. ANN. CODE. art. 45, § 5 (1957), *repealed by* Acts 1984, ch. 296, § 1.

[76] McCurdy, *supra* note 3, at 1050. In 1959, Professor McCurdy observed that Illinois, New York, North Carolina, and Wisconsin statutes specifically addressed interspousal tort suits; however, these measures are all twentieth century amendments. *See* McCurdy, *supra* note 27, at 312, 320-21. For similar amendments, see D.C. CODE ANN. § 30-201 (1981); MONT. CODE ANN. § 40-2-109 (1981); N.D. CENT. CODE § 14-07-05 (1981); VA. CODE ANN. § 8.02-220.1 (1981).

[77] One explanation for the dearth of legislative history was the noncontroversial nature of much of this legislation, so that no legislative history was created. *See infra* notes 97-99 and accompanying text. Moreover, few states recorded, compiled or maintained that type of data during the nineteenth century. *See* Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 348 (1949); *cf.* J. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, at 73-74 (1981) (federal legislative history compiled throughout nineteenth century). Little of the data that was prepared has been collected or analyzed, although the sources mentioned at *supra* note 69 comprise a helpful start.

never considered the exact question. Had they thought about the issue, few lawmakers, particularly during earlier periods, would have meant to modify interspousal tort immunity, especially in light of contemporary societal views of women, wedlock, wives, and the family.[78] The purposes of the Acts that are more readily identifiable, however, are analyzed below to ascertain the measures' implications for potential interspousal tort litigation.

(i) The First Wave. Much of the first wave of Married Women's statutes was adopted almost entirely during the 1840s.[79] Those measures were directed primarily at protecting wives' assets from their husbands' creditors, thereby creating a discrete fund for family use, while leaving coverture and marital estates essentially intact.[80]

The Acts were commercial in the sense that widespread economic difficulties had led to many alterations of debtor's law and had engendered great concern about exempting property from attachment by creditors.[81] A number of other commercial factors may explain passage of particular pieces of legislation. Between 1780 and 1840, the development of a modern scheme of commercial law facilitated the rapid expansion and industrialization of the American economy.[82] Moreover, there was considerable need for readily available capital. This could be satisfied partially by freeing wives' resources from common-law limitations and from what

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[78] Indeed, most Acts were compatible with and reinforced the views. *See infra* note 95. For a discussion of the views, see *infra* notes 91-96 and accompanying text.

[79] I rely substantially here on N. BASCH, *supra* note 9; P. RABKIN, *supra* note 10; Chused, *supra* note 21.

[80] *See* Chused, *supra* note 21, at 1361, 1398, 1400. *Accord* N. BASCH, *supra* note 9, at 226-27; P. RABKIN, *supra* note 10, at 154-55; Speth, *supra* note 69, at 72-73. Professor Chused observes, however, that "legislation chipping away at a number of the harsher consequences of coverture law had been enacted in earlier parts of the century" so that "[i]f further reform was to occur, the institution of coverture had to become the focus of attention." Chused, *supra* note 21, at 1400.

[81] *See* Chused, *supra* note 21, at 1400; Speth, *supra* note 69, at 72-73. *See also* N. BASCH, *supra* note 9, at 226 ("Precipitous dips in an increasingly complex economy encouraged legislators to pass statutes that insulated the wife's property. From the creditor's perspective, clarity was preferable to ambiguity.").

[82] *See* N. BASCH, *supra* note 9, at 39-40; P. RABKIN, *supra* note 10, at 85-105, 153-54; Johnston, *supra* note 5, at 1060-61; Powers, *supra* note 65, at 79 n.111. All of these sources cite, and Johnston and Powers rely substantially upon, the research of K. Thurman, The Married Women's Property Acts (unpublished LL.M. Thesis, University of Wisconsin Law School, 1966). *See generally* M. HORWITZ, *supra* note 43 (discussing development of modern scheme of commercial law).

probably were seen as increasingly burdensome, costly, and ineffective devices, such as "powers of attorney, antenuptial contracts, private laws, and equitable remedies," created to circumvent those strictures.[83] A related idea is that the statutes were one component of a more comprehensive effort to defeudalize and modernize real property law and make land an item of commerce.[84]

Another reason for passage of the statutes may have been the desire of fathers to protect their daughters' inherited assets or family funds from disadvantageous fluctuations in the economy or from profligate sons-in-law who might squander these resources on gambling, alcohol, or ill-advised investments.[85] The passage of the legislation, therefore, might have been responsive principally to necessities dictated by a commercial age.

Enactment of the statutes also may have been attributable to the endeavors of women's rights advocates who envisioned the establishment of a separate legal identity for wives as one means for enhancing their condition. As early as the 1790s, Mary Wollstonecraft protested the inferior legal status to which females had been relegated.[86] Moreover, the women's movement grew, so that by the time of the 1848 Seneca Falls Convention, activists were vociferously denouncing Blackstone, coverture, and wives' subservient status and were petitioning legislatures to adopt Married Women's Acts.[87] Although these proponents did not influence directly the enactment of most of the initial set of statutes,[88] evolving societal views of women probably did provide a conducive cli-

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[83] Johnston, *supra* note 5, at 1060-61. *See also* N. BASCH, *supra* note 9, at 113-35; L. FRIEDMAN, *supra* note 37, at 186; P. RABKIN, *supra* note 10, at 85-105, 153-54.

[84] *See* P. RABKIN, *supra* note 10, at 10, 153; *accord* Speth, *supra* note 69, at 76-77.

[85] *See* C. DEGLER, *supra* note 65, at 333; P. RABKIN, *supra* note 10, at 12-13, 78, 88-89, 95-96; K. Thurman, *supra* note 82, at 14-16; Chused, *supra* note 21, at 1403.

[86] *See generally* M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 109-69 (1792); M. BEARD, *supra* note 10, at 95-100; M. NORTON, *supra* note 45, at 251-55 (analyses of Wollstonecraft's work and its effect).

[87] *See* N. BASCH, *supra* note 9, at 161, 168, 170; P. RABKIN, *supra* note 10, at 110-11; Speth, *supra* note 69, at 79-80.

[88] *See* Chused, *supra* note 21, at 1361, 1400; Speth, *supra* note 69, at 72-79; *cf.* N. BASCH, *supra* note 9, at 136-61; P. RABKIN, *supra* note 10, at 10, 74 (women's movement not primarily responsible for New York's 1848 Act). The question of what impact women's rights proponents had on passage of the early Acts warrants more comprehensive treatment. For a thorough analysis of New York's Act, see Basch and Rabkin, who conclude that the Acts "gave impetus to the women's movement by providing a focus for presuffrage demands." P. RABKIN, *supra* note 10, at 11; *accord* N. BASCH, *supra* note 9, at 166-99.

mate for the measures' passage.

> As industrial capitalism pushed production out of the home in the first half of the nineteenth century, emphasis on the wife's special role was intensified, sentimentalized, and transformed into the cult of domesticity [whereby women] occupied a lofty sphere that was complementary to but clearly separate from the world of men [and in which] women redefined and expanded their roles.[89]

The "emergence of the modern American family," characterized by the companionate ideal of marriage, increased responsibility and autonomy for females in the household, and greater emphasis on child rearing and the special needs of young children, enabled wives to expand their authority in the private sphere.[90] Women's literacy rates increased substantially and their educational opportunities grew.[91] Women participated in a number of voluntary, moral reform, and religious organizations designed to improve society.[92] Thus, "when distressed economic times appeared after 1839, the moment was right for legislatures to codify a portion of the equitable separate estates tradition by insulating wives' property from their spouses' creditors."[93]

In short, the earliest group of Married Women's Acts did not affect coverture, much less emancipate wedded females or afford them equality or important rights, such as the vote or the opportunity to serve as jurors.[94] Indeed, nearly all of the legislation was

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[89] N. BASCH, *supra* note 9, at 40, 30. *Accord* M. SALMON, *supra* note 10, at 191; sources cited *supra* note 65.

[90] *See* N. COTT, *supra* note 51, at 200; C. DEGLER, *supra* note 65, at 8-9, 28, 111-43; Zainaldin, *supra* note 54, at 1084-89.

[91] *See* L. KERBER, *supra* note 49, at 193-221; M. NORTON, *supra* note 45, at 256-72; Chused, *supra* note 21, at 1416-17. *Cf.* Minow, *supra* note 9, at 866-77 (experiences of working and frontier women).

[92] *See* C. CLINTON, *supra* note 65, at 166-87; W. O'NEILL, *supra* note 9, at 18-21. *Cf.* B. EPSTEIN, THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH- CENTURY AMERICA (1981). The 1830s was a period of "extraordinary ferment," characterized by a "generalized reform spirit," during which time women were involved in anti-slavery activities. W. O'NEILL, *supra* note 9, at 18-21; *accord* C. CLINTON, *supra* note 65, at 166-87; Minow, *supra* note 9, at 877-84.

[93] Chused, *supra* note 21, at 1361.

[94] For historical analyses of the denial of rights in the public sphere, see K. O'DONOVAN, *supra* note 65, at 59-158; Taub & Schneider, *Perspectives on Women's Subordination and*

compatible with, and even reinforced, prevailing societal views of women, marriage, wives, and the family.[95] Enactment of the statutes was not particularly controversial, especially in contrast to the bitter, and even volatile, "century of struggle" over suffrage.[96] Most of the measures passed easily in all-male legislatures, with limited lobbying by women,[97] engendering minimal discussion in statehouses and little public debate.[98]

(ii) The Second Wave. The second wave of enactments afforded wives separate estates, thereby commencing the long process of dismantling coverture and providing independent legal identity. These Acts were passed over a lengthy period, which started in the 1840s and ended after the Civil War; thus, their adoption overlapped the first wave. Creation of separate estates was the most important aspect of the second group, although employment of this mechanism had contradictory implications.[99] For example, the

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the Role of the Law, ch. 6, in THE POLITICS OF LAW (D. Kairys ed. 1982); Powers, *supra* note 65, at 70-73, 79-88. Analysts nearly unanimously agree that the Acts were not intended to afford wives' equality or rights or to affect marriage. *See* B. BABCOCK, *supra* note 16, at 597; N. BASCH, *supra* note 9, at 41; M. BLOOMFIELD, *supra* note 20, at 113, 122; P. RABKIN, *supra* note 10, at 13; Chused, *supra* note 21, at 1359-61.

[95] *See* Chused, *supra* note 21, at 1361, 1423-25; K. Thurman, *supra* note 82, at 7; *cf. supra* notes 65 & 89-93 and accompanying text (discussion of prevailing societal views of women, marriage, wives, and the family); N. BASCH, *supra* note 9, at 142-43 (proponents of Act argued it would improve marriage); P. RABKIN, *supra* note 10, at 89, 154-55 (Acts strengthened family as economic unit).

[96] *See* P. RABKIN, *supra* note 10, at 10; Powers, *supra* note 65, at 79 n.111; *cf.* E. FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 62-102 (1975) (discussing suffrage struggle).

[97] *See* N. BASCH, *supra* note 9, at 156; M. BEARD, *supra* note 10, at 171-72; M. BLOOMFIELD, *supra* note 20, at 117; P. RABKIN, *supra* note 10, at 98; Chused, *supra* note 21, at 1361.

[98] *See* N. BASCH, *supra* note 9, at 136; C. DEGLER, *supra* note 65, at 333; P. RABKIN, *supra* note 10, at 153; K. Thurman, *supra* note 82, at 50. The above account of passage of the first wave of Acts necessarily is general. One or a combination of the factors examined above may have affected passage of specific Acts. Moreover, these explanations are not an exhaustive catalog. For example, passage may have been part of broader codification and law reform efforts, as manifested specifically in the effort to democratize equity. *See* N. BASCH, *supra* note 9, at 116, 126, 226-27; and P. RABKIN, *supra* note 10, at 10-11, 31-90 (discussing codification and law reform effort); N. BASCH, *supra* note 9, at 136-61; M. BLOOMFIELD, *supra* note 20, at 113 (discussing equity's democratization).

[99] The "early statutes inevitably needed refinement to account for ambiguity, enlarged goals, or hostile judicial reception." Chused, *supra* note 21, at 1398 n.202; *accord* N. BASCH, *supra* note 9, at 136-61; M. BLOOMFIELD, *supra* note 20, at 117. Much work remains to be done on the second wave, but Professors Basch and Chused have done the most, and I rely here upon them. There is widespread agreement that the judiciary narrowly construed the Acts. *See* sources cited in N. BASCH, *supra* note 9, at 202 n.2; Chused, *supra* note 21, at 1400

use of separate estates indicates that wives' property was seen primarily as a family asset or as protection for abandoned or widowed women and that wives were to have more power to dispose of separate property. Nonetheless, the "very device used to confirm women's special sphere . . . created a wedge in the coverture bastion, and confirmed for women a small degree of independence from their marriage partners."[100] Although women's rights advocates lobbied actively for this legislation, particularly in states such as New York, and for some of the subsequent measures,[101] even these "statutes were neither driven by the Women's Movement nor indicated a commitment to women's rights."[102] This is only one of "myriad contradictions" reflected in most legislation passed after the first set of Acts.[103]

(iii) The Third Wave. The third series of measures, passed primarily in the 1870s, principally protected wives' earnings from their husbands, further eroding the unity concept and enhancing married women's legal personalities. These statutes probably were premised more on an "ideology lauding the capacity of women to

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n.211 (high probability of mixed picture). *But cf.* Johnston, *supra* note 5, at 1069 (much more evidence needed to conclude "general pattern" existed in which judiciary "deliberately sabotaged legislative attempts to implement broad reforms").

[100] Chused, *supra* note 21, at 1412.

[101] "Only after this initial wave of debtor protection measures appeared did the women's movement get deeply and successfully involved in substantial reform of coverture law." Chused, *supra* note 21, at 1361. *Accord* Speth, *supra* note 69, at 72-85. For discussion of the role of the women's movement in New York, see N. BASCH, *supra* note 9, at 162-99; P. RABKIN, *supra* note 10, at 106-17. *Cf.* M. BEARD, *supra* note 10, at 128-33; Speth, *supra* note 69, at 82-83 (other states).

[102] Telephone interview with Richard Chused, Professor of Law, Georgetown University Law Center (May 3, 1985). *Accord* Speth, *supra* note 69, at 83-84.

[103] Chused, *supra* note 21, at 1412. The most prominent contradiction was mentioned in *supra* note 102 and accompanying text. Another contradiction is that separate estates afforded incentives to hide family resources from creditors in the wives' estates. These developments eventually evoked legislative responses. *See* Chused, *supra* note 21, at 1412; Chused, *supra* note 69, at 23, 35. Much said above regarding the first wave of Acts applies to the second wave. For discussion of societal views of women, marriage, wives, and the family at this time, see E. FLEXNER, *supra* note 96, at 78-144; T. HAREVEN & M. VINOVSKIS, FAMILY AND POPULATION IN NINETEENTH CENTURY AMERICA (1978) [hereinafter T. HAREVEN]; J. HIGHAM, FROM BOUNDLESSNESS TO CONSOLIDATION: THE TRANSFORMATION OF AMERICAN CULTURE (1969); M. RYAN, CRADLE OF THE MIDDLE CLASS, THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865, at 145-229 (1981). *Cf. supra* notes 65 & 89-93 and accompanying text (views during earlier part of period); N. BASCH, *supra* note 9, at 162-99; C. CLINTON, *supra* note 65, at 40-71; Welter, *supra* note 65, at 24-41 (views during latter part of period).

make finer moral judgments," particularly regarding children,[104] than on solicitude for working wives' needs. This was evidenced by decreasing interest in the legislation of women's rights proponents[105] and the enhanced vitality of the "cult of domesticity" during the Victorian era.[106]

After this period in every jurisdiction legislatures continually amended the enactments. Merger was dismantled gradually with the alteration of specific indicia of legal identity. Some incidents of legal personality, like the capacity to litigate, undoubtedly were necessary to effectuate indicia already granted.[107] Although a number of measures legalized wives' relationships with "anyone," few explicitly provided for much interspousal legal activity.[108] Some of the legislative initiatives may have been responsive to unpalatable judicial construction, the lobbying efforts of moral reformers or

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[104] Chused, *supra* note 21, at 1424. Much work remains to be done on the third wave of Acts, but Professor Chused has done the most. *See id.*; Chused, *supra* note 69. I substantially rely on his work here.

[105] The earnings legislation might have been responsive to working wives' needs. In fact, Elizabeth Cady Stanton did urge passage on their behalf. *See* P. RABKIN, *supra* note 10, at 113. Professor Basch persuasively refutes this idea, however. *See* N. BASCH, *supra* note 9, at 164-99. *Cf.* P. RABKIN, *supra* note 10, at 139-46 (impact on working wives of Earnings Act judicial construction). E. PLECK, *supra* note 40, at 49-66 (women's movement of 1850s exposed domestic abuses and promoted legislation that would add physical cruelty as grounds for divorce in New York State).

An important reason for the reformers' decreasing interest in the legislation was their increasing focus on suffrage, an interest attributable partly to work on the Acts. *See* N. BASCH, *supra* note 9, at 207-08; P. RABKIN, *supra* note 10, at 156. New York is anomalous in several ways; its Earnings Act passed in 1860 and was instigated by the women's movement. *See* N. BASCH, *supra* note 9, at 162-99; P. RABKIN, *supra* note 10, at 106-17.

[106] *See* Chused, *supra* note 21, at 1423-24; *cf. supra* note 65 (discussing cult of domesticity). For discussion of societal views of women, marriage, wives, and the family at this time, see E. FLEXNER, *supra* note 96, at 115-44; T. HAREVEN, *supra* note 103; R. WIEBE, THE SEARCH FOR ORDER 1877-1920, at 1-110 (1967).

[107] *See* N. BASCH, *supra* note 9, at 165. States frequently included the capacity to litigate and additional indicia in their civil procedure codes. *See, e.g.*, the Acts at issue in Peters v. Peters, 156 Cal. 32, 35, 103 P. 219, 220-21 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Chused, *supra* note 69, at 33 n.116. Much work remains to be done on the Acts passed after the third wave. For helpful discussion of these Acts, see Johnston, *supra* note 5, at 1070-89.

[108] *See, e.g.*, 1860 N.Y. Laws ch. 90, ¶ 2; D.C. Code § 1155 (1901), *quoted and construed in* Thompson v. Thompson, 218 U.S. 611, 615-16 (1910). *Cf.* 1884 N.Y. Laws ch. 384 (wives could contract as if single but not with husbands). Indeed, much nineteenth century litigation over the Acts involved family creditors who sued one of the spouses, not interspousal actions. *See* P. RABKIN, *supra* note 10, at 126, 155; Chused, *supra* note 69 (impact of family debtor-creditor problems on Married Women's law in Oregon); Speth, *supra* note 69, at 79.

women's rights activists, or to a number of other forces.[109] For instance, the practice of employing the separate estate device to hide family assets from creditors led numerous jurisdictions to adopt statutes permitting creditors to reach both spouses' property.[110]

This final group of enactments was so disparate that it may not even comprise a wave. It, like the second and third, only eroded unity to the extent that a specific disability of coverture was modified and did not provide significant rights, such as suffrage. Nonetheless, these measures probably were most important to the eventual abolition of immunity.[111]

This survey of the Married Women's statutes demonstrates the difficulty of characterizing the reform as a wholesale attack on the merger concept. The measures did not create independent legal status or comprehensively emancipate wives, much less restructure marriage or the family.[112] The nineteenth century amendment process is described best as "evolutionary"; it was primarily commercial and principally involved the gradual extension of separate estates to married women and equalization of property available to creditors.[113] The considerations above are not dispositive of the legislation's implications for immunity, because by the concluding phases of the amendment process, coverture was no longer a legal reality. Indeed, the addition of each incident of separate legal identity and concomitant removal of an incident of coverture increased the plausibility of arguing that the measures eroded unity, en-

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[109] *See* Chused, *supra* note 21, at 1400, 1424; *cf. supra* note 99 (discussing judicial construction of Acts).

[110] *See* Chused, *supra* note 21, at 1412; Chused, *supra* note 69, at 23, 35. The caveats mentioned in *supra* note 98 are especially applicable to the final group of Acts. For societal views of women, marriage, wives, and the family at this time, see the sources cited *supra* notes 103 & 106.

[111] *See infra* notes 246-55, 324 & 329 and accompanying text.

[112] As late as the 1890s, marital property law could be characterized as a "jumbled patchwork reflecting no coherent policy or philosophy concerning the status of married women." Johnston, *supra* note 5, at 1069; *accord* N. BASCH, *supra* note 9, at 38, 224. *Cf.* Chused telephone interview, *supra* note 102 ("radical restructuring of the family was not in the imagination" of any legislators, who were principally conservative men).

[113] Perhaps Professor Chused most accurately captures the amendment process:

> [O]ne must hypothesize that shifts in the nation's economy, job map, family structure, agricultural productivity, banking practices, and trade structures would be mirrored by piecemeal, one step to the left, one step to the right, reforms in legal norms, and that changes would reflect generally held perceptions about women's appropriate sphere of influence.

Chused, *supra* note 21, at 1423.

hanced wives' legal status, or emancipated them and, thus, altered the notion of tort immunity. Accordingly, as early as the 1860s, lawyers seized upon the statutes and contended that they provided for personal injury litigation between husbands and wives.[114] These suits commenced a process which has continued unabated to the present.

b. Immunity Case Law. Because legislatures did not specifically address interspousal tort immunity, judicial opinions have been determinative.[115] The 125 years of case law-common law development can be divided into four discrete periods.[116] Between 1863 and 1913, judges unanimously rejected interspousal personal injury claims. In 1910 a sharply divided United States Supreme Court recognized the rule. From 1914 until 1920, jurists in seven states allowed such actions, and a comparable number denied them. During the ensuing half century, immunity slowly eroded. Finally, since approximately 1970, the doctrine has been converted to a minority rule.[117]

(i) 1863-1913. The twelve state courts asked to permit interspousal tort actions in the half century after 1863 refused to do

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[114] The first reported case is Longendyke v. Longendyke, 44 Barb. 366 (N.Y. 1863). *Cf. supra* note 63 and accompanying text (why first case brought then).

[115] *See supra* note 76 and accompanying text.

[116] Numerous difficulties attend any attempt to provide a coherent account of 125 years of opinions. Many considerations affected specific cases that were issued during such a lengthy period. Moreover, there are hundreds of opinions. Their chronological examination yielded insights and undermined numerous preconceptions. The opinions can be classified into surprisingly discrete groups, even though this may be too "structuralist," "instrumentalist," or "evolutionary" for some. *See, e.g.*, Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018-24 (1981) [hereinafter Gordon I]; Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975) [hereinafter Gordon II]; Minow, *supra* note 9. The conclusions herein are intended to provoke thinking about these cases and the issues they raise. Others are encouraged to assess the opinions and questions, reach their own conclusions, and contribute to ongoing debate. *See* Olsen, *supra* note 65, at 1560 n.241. I appreciate the limitations of relying on legal texts and cases, especially intentional tort cases that reflect "trouble" in the community. *See* K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY 20-63 (1941); Minow, *supra* note 9, at 825, 850 (explaining case of trouble).

[117] For some of the difficulties entailed in ascertaining why the opinions were decided these ways, see G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 74-95 (1978); Feinman, *The Meaning of Reliance*, 1984 WIS. L. REV. 1373; Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722 (1980); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Gordon I, *supra* note 116; Gordon II, *supra* note 116; Minow, *supra* note 9. Helpful suggestions for future work can be gleaned from N. BASCH, *supra* note 9; Chused, *supra* note 21; Minow, *supra* note 9.

so.[118] Uniform rejection is not surprising, given the legal status of wives, the significance of coverture, and the lack of clarity respecting immunity in the Married Women's Acts.[119] Moreover, this result was consistent with courts' perspectives on their responsibilities in handling immunity, prevailing societal images of females, wedlock, wives, and the family, and other tort law developments.[120] Somewhat less predictable than the results reached are the similar reasoning processes employed.[121] The cases rejecting interspousal tort actions articulate every major policy argument subsequently espoused to justify immunity, and they facilitate understanding of

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[118] An 1882 opinion of a New York intermediate appellate court would have permitted interspousal tort litigation. *See* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33, *rev'd*, 89 N.Y. 644 (1882). The summary reversal of the case indicates its relative insignificance. Nationwide retention of immunity during the ensuing 30 years and the failure of courts to abolish immunity in reliance on the decision also reflect its insignificance. But the opinion's author did depend on decisional techniques, statutory interpretation, and policy concepts similar to those relied upon by many judges who later abrogated immunity. For purposes of continuity, the decision will be treated with the initial cases abolishing immunity, *see infra* notes 246-64 and accompanying text. There also is the 1910 dissenting opinion in Thompson v. Thompson, 218 U.S. 611 (1910) (discussed *infra* notes 205-21 and accompanying text). The cases retaining immunity were *Thompson*, 218 U.S. 611; Peters v. Peters, 156 Cal. 32, 38, 103 P. 219, 221, (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 691, 376 P.2d 65, 70 (1962); Main v. Main, 46 Ill. App. 106 (1891); Henneger v. Lomas, 145 Ind. 287, 296, 44 N.E. 462, 465 (1896); Peters v. Peters, 42 Iowa 182 (1875), *overruled*, Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Abbott v. Abbott, 67 Me. 304, 309 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Libby v. Berry, 74 Me. 286, 289 (1883); Bandfield v. Bandfield, 117 Mich. 80, 83, 75 N.W. 287, 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Strom v. Strom, 98 Minn. 427, 428, 107 N.W. 1047, 1048 (1906), *overruled*, Poepping v. Lindeman, 268 Minn. 30, 127 N.W.2d 512 (1964), and *overruled*, Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Longendyke v. Longendyke, 44 Barb. 366, 368-70 (N.Y. 1863); Freethy v. Freethy, 42 Barb. 641 (N.Y. 1865); *Schultz*, 34 N.Y. Sup. Ct. at 26; Abbe v. Abbe, 22 A.D. 483, 484, 48 N.Y.S. 25 (1897); Nickerson v. Nickerson, 65 Tex. 281, 283 (1886), *overruled*, Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1978); Sykes v. Speer, 112 S.W. 422, 424-25 (Tex. Civ. App. 1908), *modified sub nom.* Speer & Goodnight v. Sykes, 102 Tex. 451, 119 S.W. 86 (1909); Schultz v. Christopher, 65 Wash. 496, 501, 118 P. 629, 631 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). *Cf.* Deeds v. Strode, 6 Idaho 317, 55 P. 656 (1898) (dictum); McKelvey v. McKelvey, 111 Tenn. 388, 391, 77 S.W. 664, 668 (1903) (dictum), *overruled*, Davis v. Davis, 657 S.W.2d 753, 759 (Tenn. 1983).

[119] *See supra* notes 66-111 and accompanying text.

[120] *See infra* notes 159-89 and accompanying text (considerations regarding torts, judicial views, and societal images). The societal images also are mentioned, *see supra* notes 103 & 106, and articulated by judges in opinions recognizing immunity. *See, e.g., infra* notes 141-56 and accompanying text.

[121] The reasoning processes are remarkably similar, although not identical.

the doctrine's survival into the late twentieth century.[122] Accordingly, these cases merit comprehensive examination.

The starting point for the courts was the common law. Most judges simply announced, with little explanation and even with approval of plaintiff's counsel,[123] the existence of a substantive common-law rule of interspousal tort immunity, although there technically was no rule as such.[124] These judges apparently were taking the common-law fiction of marital merger, essentially as formulated by Blackstone and applied in America, and transforming it into a substantive tort rule.[125] Some courts, however, were more explicit about their reasoning. They began with the unity maxim and explained that at common law wives: (1) had no substantive civil causes of action against anyone, including their husbands; (2) were under a procedural disability, requiring that husbands file tort suits on their behalf; or (3) were not entitled to damages recovered because any such award would belong to their husbands.[126]

As each court concluded that there was a common-law rule of tort immunity, each proclaimed that the rule could be modified

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[122] Indeed, the public policies judges espoused during this period were adopted by jurists deciding cases much later; were the precursors of the principal policy arguments for immunity's retention; and eventually evolved into a standard litany recited by courts whenever they rejected requests to permit interspousal tort actions. The cases also afford insights into nineteenth century judicial decisionmaking and societal views of women, marriage, wives, and the family that have implications beyond the confines of tort immunity. *See, e.g., infra* notes 177-81 and accompanying text.

[123] Counsel who pursued the first reported case conceded that "by the rules of the common law husband and wife could not sue each other in a civil action." Longendyke v. Longendyke, 44 Barb. 366, 367 (N.Y. 1863).

[124] "[T]ort actions between husband and wife were unknown at common law." Haglund, *supra* note 24, at 704. One reason for this was that "torts was not considered a discrete branch of law until the late nineteenth century." G. WHITE, TORT LAW IN AMERICA 1 (1979). *Accord* W. PROSSER & W.P. KEETON, *supra* note 2, § 1.

[125] *See, e.g.*, Main v. Main, 46 Ill. App. 106, 107 (1891); Schultz v. Christopher, 65 Wash. 496, 498, 118 P. 629, 629 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). For a discussion of Blackstone's articulation of the merger fiction and of his influence in America, see *supra* notes 20-23 and accompanying text. *Cf.* Crowell v. Crowell, 180 N.C. 516, 522-23, 105 S.E. 206, 210 (1920); *supra* notes 18-19 and accompanying text (alternative origins of merger fiction). One judge simply seemed to presume that a substantive tort rule existed. *See* Bandfield v. Bandfield, 117 Mich. 80, 83, 75 N.W. 287, 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971).

[126] *See, e.g.*, Henneger v. Lomas, 145 Ind. 287, 288-91, 44 N.E. 462, 463-64 (1896); *Longendyke*, 44 Barb. at 368-69; *Schultz*, 65 Wash. at 498, 118 P. at 629.

only by statute.[127] Thus the merger concept, which remained, after all, a fiction, was converted into a rule of common law. This pronouncement had two effects. First, it invested the transformed unity construct with solidity and validity.[128] Second, it foreclosed consideration of the interspousal issue as a common-law policy question amenable to judicial treatment independent of legislative action.[129] Indeed, it is difficult today to appreciate the almost mystical authority that the merger notion exerted over jurists during this period. Unity was a "metaphor of enormous power" and resilience that exercised "linguistic hegemony."[130] The fiction was effectively the measure of all things legal between husbands and wives.

Once judges had chosen to treat the merger maxim as a common-law rule that could be altered only by legislation, the immunity issue became essentially a question of statutory interpretation—that is, of ascertaining whether the Married Women's Acts permitted interspousal tort claims. In construing the statutes, most courts followed several steps and employed varying techniques purportedly designed to determine the intent of legislatures in adopting the enactments.

The initial step was the perfunctory examination of the relevant statutory language to discern whether it expressly prescribed tort

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[127] *See, e.g., Henneger*, 145 Ind. at 293-94, 44 N.E. at 464; Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Freethy v. Freethy, 42 Barb. 641, 641-42 (N.Y. 1865).

[128] *See infra* note 130 and accompanying text (solidity and validity); *supra* notes 20-27; *infra* notes 177-81 and accompanying text (possible reasons therefor).

[129] Although jurists did rely on policy concepts when construing the Married Women's Acts, *see, e.g., infra* notes 143-56 and accompanying text, treating tort immunity solely as a common law policy question may have been incompatible with judges' views of their roles, *see infra* notes 162-63 and accompanying text. These ideas conflict with the widely accepted view that many judges worked in the "Grand Style" and were amenable to modifying the common law between 1800 and 1850. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 35-38 (1960); M. HORWITZ, *supra* note 43, at 26-30; R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); *infra* notes 159-60 and accompanying text. *Cf. Abbott*, 67 Me. at 307 (allusion to law's growth by adapting itself to present societal conditions).

[130] I use hegemony in the sense that Antonio Gramsci did, *see, e.g.*, A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (1971), as described in C. BOGGS, GRAMSCI'S MARXISM 39-40 (1976), and as Professor Basch does, *see* N. BASCH, *supra* note 9. *Cf.* E. GENOVESE, *supra* note 29, at 25 ("hegemonic function of the law"). Professor Basch persuasively shows the enormous power and resilience of the merger fiction which served the "legal needs of three shifting social structures," and "survived its feudal origins and early modern connections," "the dislocations of colonization and revolution," and "the legislative assaults of the nineteenth century." N. BASCH, *supra* note 9, at 26-27, 38-69.

suits between spouses. No Act was found to so provide.[131] Although a few courts acknowledged that particular statutes' wording might be sufficiently comprehensive to encompass such litigation, each felt obligated to ensure that this reading comported with the intent and spirit of its legislature. The focus of analysis for all of the courts, therefore, ostensibly shifted from the language of the statutes almost exclusively to the legislative intent and purposes which were believed to underlie adoption.[132] When ascertaining legislative intent, the courts did not consult secondary legislative materials, such as committee reports or floor debates.[133] Instead, they employed abstract canons of statutory construction and made choices premised upon their ideas of public policy.

The overarching principle of statutory interpretation, variously formulated, was the "derogation" canon: courts strictly construed legislation in derogation of the common law.[134] For example, some courts declared that when an enactment was phrased in general language and any doubt existed, it should be interpreted in accordance with the common law because the legislature was presumed

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[131] *See, e.g.*, Main v. Main, 46 Ill. App. 106, 109 (1891); Bandfield v. Bandfield, 117 Mich. 80, 82, 75 N.W. 287, 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Schultz v. Christopher, 65 Wash. 496, 498-99, 118 P. 629, 629-30 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

[132] This shift in analytical focus constituted an implicit rejection of the "plain meaning" concept, application of which would have obviated the need to consider legislative intent. *See* Thompson v. Thompson, 218 U.S. 611, 621-24 (1910) (Harlan, J., dissenting). The plain meaning concept was familiar to nineteenth century jurists. *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 399 (1805); T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 309-12 (1857). *Cf.* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (C. Sands 4th ed. 1973); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939) (discussing concept).

[133] None of the opinions listed at *supra* note 118 mentions secondary sources. Writers have identified this phenomenon in broader contexts. *See, e.g.*, J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 186-88 (1950) (tracing judicial use of legislation) [hereinafter HURST I]; J. JOHNSON, *supra* note 77, at 78-79 (first third of twentieth century witnessed more pronounced use of legislative history). Courts apparently did not attempt to consult legislative materials even with suits instituted relatively soon after enactment. *See, e.g*, Freethy v. Freethy, 42 Barb. 641 (N.Y. 1865). *But cf. supra* note 77 and accompanying text (few states compiled legislative history and when available it probably was not illuminating); *infra* note 167 (questioning propriety of consulting secondary sources).

[134] *See, e.g.*, Peters v. Peters, 156 Cal. 32, 36, 103 P. 219, 221 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); *Bandfield*, 117 Mich. at 82, 75 N.W. at 288; *Freethy*, 42 Barb. at 642-43, 645. *Cf. infra* note 167 (discussing derogation canon).

to have changed the common law only to the extent that the statute expressly stated.[135] A few judges articulated the canon differently. They warned that courts must remember the law prior to passage of new legislation and the modification intended and assume that legislators were cognizant of the longstanding common law and legislated with it in mind.[136] Regardless of how courts formulated the derogation canon, they applied it with exacting specificity, invariably yielding the same result: legislatures intended only those modifications of the common law explicitly enumerated in the terms of the statutes. For instance, a statute providing that "any married woman may bring and maintain an action in her own name, for damages, against any person . . . for any injury to her person or character, the same as if she were sole"[137] was deemed insufficient. Courts applying the derogation canon determined that the enactments did not lift disabilities imposed upon wives at common law,[138] sever merged legal identity,[139] or expand wives' legal personalities[140] any more than was expressly provided.

The second principal way that judges discerned "legislative intent" was to rely upon public policy reasons why legislators could not have intended to prescribe interspousal tort claims.[141] The articulation of these policies was subtle and complex. Courts seemed to be saying that legislatures could not have intended certain undesirable effects, primarily relating to marriage and the family,

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[135] *See, e.g., Bandfield*, 117 Mich. at 82, 75 N.W. at 288; *Freethy*, 42 Barb. at 642-45.

[136] *See, e.g., Bandfield*, 117 Mich. at 82, 75 N.W. at 288; *Freethy*, 42 Barb. at 642-45. *But cf.* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 30 (holding Act's purpose to invade and dispel common law, and Act not to be construed with reference to common law at time of passage), *rev'd*, 89 N.Y. 644 (1882).

[137] *Freethy*, 42 Barb. at 642 (construing New York Married Women's Act). The court would have required explicit inclusion of the term "husband" before allowing suit, *see id.* at 644-45, even though when the state assembly wanted to exclude husbands from the purview of Married Women's Acts, it nearly always provided so expressly. *See Schultz*, 34 N.Y. Sup. Ct. at 32-33.

[138] *See, e.g.*, Strom v. Strom, 98 Minn. 427, 428, 107 N.W. 1047, 1048 (1906); *Freethy*, 42 Barb. at 645. *But see Schultz*, 34 N.Y. Sup. Ct. at 30.

[139] *See, e.g.*, Henneger v. Lomas, 145 Ind. 287, 293, 44 N.E. 462, 464 (1896); Longendyke v. Longendyke, 44 Barb. 366, 369 (N.Y. 1863). *But see Schultz*, 34 N.Y. Sup. Ct. at 30.

[140] *See, e.g.*, Peters v. Peters, 156 Cal. 32, 35-36, 103 P. 219, 220-21 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); Main v. Main, 46 Ill. App. 106, 108 (1891); Bandfield v. Bandfield, 117 Mich. 80, 83, 75 N.W. 287 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, 197 N.W.2d 236 (1971). *But see Schultz*, 34 N.Y. Sup. Ct. at 30.

[141] Nearly every court that recognized or retained immunity employed this method and relied upon similar policy reasons.

which judges thought would necessarily result from tort suits between husbands and wives. Thus, courts inverted the technical meaning of legislative intent by consulting their post-enactment concerns regarding the statutes' potential adverse impacts, rather than the contemporaneous purposes of legislators who passed the statutes.[142]

Courts espoused many policy reasons for finding that the statutes did not authorize interspousal tort suits; most of these policies pertained much more to marriage and the family than to substantive tort law.[143] The overarching factor was fear that allowing personal injury claims would create, or exacerbate preexisting, marital disharmony.[144] Because it was clear state policy to protect wedlock and the family, legislatures could never have "intended to permit such actions."[145]

One important way in which these suits were thought to disrupt connubial peace was by exposing delicate matters to public scrutiny.[146] Abolition of immunity also was believed to threaten marital

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[142] *Cf.* T. SEDGWICK, *supra* note 132, at 309, 231 (rejecting judicial consideration of effects when legislation clear but recognizing such practice when legislation ambiguous). For a discussion of what legislators who passed the Acts might have "intended" for tort immunity, see *supra* notes 66-114 and accompanying text.

[143] Indeed, the cases as a whole leave the impression that tort immunity was more a matter of family law than of tort law.

[144] The marital harmony concept, which was articulated first, has been enunciated most consistently and still has much vitality. *See infra* notes 417-54 and accompanying text. Most of the policy reasons that judges espoused are versions of this rationale. *See, e.g., infra* notes 518 & 539 and accompanying text.

[145] *See, e.g.*, Peters v. Peters, 156 Cal. 32, 35, 103 P. 219, 220 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); Longendyke v. Longendyke, 44 Barb. 366, 368-69 (N.Y. 1863). *But cf.* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33, *rev'd*, 89 N.Y. 644 (1882) (interspousal tort actions could preserve or promote harmony).

[146] Because "private matters of the whole period of married existence might be exposed by suits," courts found it preferable "to draw the curtain and shut out the public gaze." Abbott v. Abbott, 67 Me. 304, 307-08 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980). This privacy component of the marital harmony rationale relates to broader themes in nineteenth century judicial decisionmaking that "privatized" and "de-legalized" the family. *See* Olsen, *supra* note 65, at 1501-07; *infra* notes 169-72 and accompanying text. Central to these ideas is a world "split" into a legalized public sphere inhabited by men and a private sphere without law to which women were relegated. *See* K. O'DONOVAN, *supra* note 65, at 59-158; Powers, *supra* note 65, at 70-73, 79-88; Polan, *Toward a Theory of Law and Patriarchy*, ch. 15, in THE POLITICS OF LAW (D. Kairys ed. 1982); Taub & Schneider, *supra* note 94; *cf.* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 83-90 (1979); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 656-58 (1983). *But cf.* Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1165 (danger of split sphere approach as

tranquility by allowing spouses to invoke the tort litigation process for the resolution of minor conjugal differences, such as petty domestic quarrels.[147] Moreover, judges reasoned that retention of immunity could even promote marital harmony because it required spouses to resolve their difficulties, essentially by forgiving and forgetting.[148]

Numerous courts also evinced concern about the problems entailed in distinguishing behavior that would be considered tortious between strangers from similar conduct between spouses which would not be actionable.[149] A number of judges worried about burdens imposed upon the judicial system by excessive and frivolous or trivial claims, and a few jurists expressly mentioned the possibility of multiple suits upon divorce.[150]

Courts also rejected interspousal tort claims because as a matter of policy they believed that legislators could not have "intended" such claims. The judges premised this conclusion on the legislatures' provision of adequate remedies for spouses for tortious behavior, primarily criminal and divorce actions.[151] Some courts, apparently alluding to the threat of duplicate claims upon marital dissolution, specifically observed that divorce afforded the advantage of resolving all interspousal disputes in a single proceeding.[152]

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analytical tool).

[147] Courts evinced concern about interspousal litigation over "every real and fancied wrong." Bandfield v. Bandfield, 117 Mich. 80, 82-83, 75 N.W. 287, 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, N.W.2d 236 (1971). *Accord Longendyke*, 44 Barb. at 369. This idea is a forerunner of the "floodgates" policy argument. *See infra* notes 149-50 & 521-41 and accompanying text.

[148] *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980). *Accord* Freethy v. Freethy, 42 Barb. 641, 645 (N.Y. 1865). For helpful discussion of the "forgiving and forgetting" rationale and related notions of altruism, sharing, and sacrifice within the family, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-37 (1976); Olsen, *supra* note 65, at 1505, 1520-24; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 623-24 (1983).

[149] *See, e.g.*, Schultz v. Schultz, 34 N.Y. Sup. Ct. 33, 34 (Davis, P.J., dissenting), *rev'd*, 89 N.Y. 644 (1882).

[150] *See, e.g.*, Main v. Main, 46 Ill. App. 106, 108-09 (1891); *Abbott*, 67 Me. at 307-08; Schultz v. Christopher, 65 Wash. 496, 501, 118 P. 629, 630-31 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), and *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). This idea illustrates the overlapping nature of the policy arguments because it implicates the marital harmony, "floodgates," and "alternative remedies" arguments. *See supra* note 147 and *infra* notes 151-52 and accompanying text.

[151] *See Main*, 46 Ill. App. at 108; *see infra* notes 542-63 and accompanying text.

[152] *See, e.g.*, *Main*, 46 Ill. App. at 108; *Abbott*, 67 Me. at 307-08; *Schultz*, 65 Wash. at 501, 118 P. at 630-31.

Judges articulated several additional public policies. They declared that wives should not be allowed to sue their husbands for personal injuries because "marriage acts as a perpetually operating discharge of all wrongs between man and wife."[153] Courts also expressed concern that such litigation would provide a new means for unfairly raiding estates[154] and could jeopardize testamentary dispositions that otherwise might have been made.[155] Moreover, judges espoused a juridical equality idea, observing that husbands never had been permitted to file personal injury claims against wives.[156]

In short, courts treated the interspousal issue principally as a question of statutory interpretation by discerning legislative intent through application of certain abstract canons and public policies. Judges could have made different choices, however. Instead of relying upon the derogation canon, they could have used its complement: remedial measures are to be construed liberally. Similarly, courts might have found that permitting interspousal tort litigation could deter the intentional infliction of injury, thereby promoting marital harmony.[157] Moreover, judges might have eschewed reliance on the canons and public policy and consulted legislative

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[153] Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980), *cited in* Peters v. Peters, 156 Cal. 32, 36, 103 P. 219, 221 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962). *But cf.* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33 (holding husband's intentional tort violated marital contract and responsibilities), *rev'd*, 89 N.Y. 644 (1882). Perhaps courts recognizing immunity were suggesting that marriage is a contract, albeit not subject to the rules generally governing such agreements. *See* text accompanying *supra* note 16.

[154] *See, e.g., Abbott*, 67 Me. at 308; Longendyke v. Longendyke, 44 Barb. 366, 369 (N.Y. 1863). The concerns appear to be a precursor of the fraud and collusion policy contention, discussed *infra* notes 457-503 and accompanying text. *See* Price v. Price, 732 S.W.2d 316, 317 (Tex. 1987).

[155] *Longendyke*, 44 Barb. at 369.

[156] *See, e.g.*, Strom v. Strom, 98 Minn. 427, 428, 107 N.W. 1047, 1048 (1906), *overruled*, Poepping v. Lindeman, 268 Minn. 30, 127 N.W.2d 512 (1964), and *overruled*, Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Freethy v. Freethy, 42 Barb. 641, 644 (N.Y. 1865); Schultz v. Christopher, 65 Wash. 496, 500, 118 P. 629, 630 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). For a helpful discussion of the juridical equality idea, see Olsen, *supra* note 65, at 1505, 1512, 1516-20. Of the cases listed at *supra* note 118, Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909), is the only one brought by a husband intentionally injured by his wife.

[157] *See* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33 (contemporaneous judicial expression), *rev'd*, 89 N.Y. 644 (1882); *infra* note 445 and accompanying text (modern expression).

history.[158]

There are a number of explanations for the courts' treatment of immunity. The most significant derive from broader currents in judicial decisionmaking after 1850, particularly jurists' views of appropriate roles for courts to play, especially vis-a-vis legislatures.

Judges' perspectives on their functions changed dramatically in the middle of the nineteenth century. The first half of the century was a time of great legal innovation. Jurists deciding cases in the "Grand Style"[159] were willing to use the common law as an instrument of social policy and came to see themselves as lawmakers with primary responsibility for shaping private law doctrine.[160]

In contrast, the second half of the century was a period of consolidation, when "precedents were regarded as settled, rules as formulated, and principles as defined,"[161] characterized by formalistic opinion writing. Courts typically were reluctant to act unless compelled by precedent or empowered by statute.[162] Professing to observe a strict separation of powers, and categorizing governmental authority according to function, each branch having hegemony in its respective sphere, judges announced that they were merely to

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[158] Judges may not have relied on legislative history, however, because it was usually unavailable or unilluminating or because such reliance was considered improper. *See supra* notes 77 & 133 and accompanying text; *infra* note 167. *Cf. infra* notes 159-66 and accompanying text (explanations why judges relied on canons and public policy).

Of course, judges also might have read the Acts' language more broadly. But even courts treating Acts passed nearer the end of the amendment process, when coverture had been substantially eroded, read them narrowly so as to find that wives could only sue third parties. *See, e.g.*, Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909).

[159] K. LLEWELLYN, *supra* note 129, at 36-38. *Accord* M. HORWITZ, *supra* note 43, at 26-30; HURST I, *supra* note 133, at 186-88; J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956) [hereinafter HURST II]. Full treatment of these ideas is beyond the scope of this Article and must await much more research, but their contours can be sketched, and plausible accounts afforded, by relying principally on the sources above.

[160] *See* M. HORWITZ, *supra* note 43, at 26-30; HURST II, *supra* note 159; K. LLEWELLYN, *supra* note 129, at 36-37. *Cf.* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950) (statutes construed freely to implement purposes from 1820 to 1850). *Accord* HURST I, *supra* note 133, at 186-89.

[161] J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE 299 (1967). *Accord* M. HORWITZ, *supra* note 43, at 253-66. *Cf.* HURST II, *supra* note 159; K. LLEWELLYN, *supra* note 129, at 35-41; R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (discussing formalism).

[162] *See* J. REID, *supra* note 161, at 299; G. WHITE, THE AMERICAN JUDICIAL TRADITION 113-14 (1976).

find, declare or interpret, but not to make, law. "Policy," it was said, "is for the legislature, not for the courts, and so is change even in pure common law."[163] Judges exhibited a preference approaching reverence for the common law, much of which their predecessors had created during the preceding half century. Correspondingly, courts evinced less regard for legislative law. They viewed statutes as alien intruders upon the well-ordered common-law system.[164] Judges also considered legislatures as competitors for governmental authority; as populist, political, and potentially redistributional; or as lacking the requisite competence to draft adequate measures.[165]

Thus, courts displayed significantly increased willingness to scrutinize, read restrictively, and even invalidate enactments like the Married Women's Acts.[166] Judges regularly announced that policy was for legislatures, not courts. They ascertained legislative intent almost entirely by employing techniques and consulting materials unrelated to the Acts or the legislative process.[167] They accorded cursory consideration to statutory phraseology, unless blindingly clear. Jurists also applied abstract rules of construction, particularly the derogation canon, while they ascertained legisla-

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[163] K. LLEWELLYN, *supra* note 129, at 38. *Accord* HURST I, *supra* note 133, at 186-89.

[164] *See* K. LLEWELLYN, *supra* note 129, at 39; HURST I, *supra* note 133, at 186-89; J. HURST, DEALING WITH STATUTES 41-42 (1982) [hereinafter HURST III]; Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-15 (1936). *Cf.* R. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930, at 1-2 (1986) (Anglo-American community of scholars dedicated to celebration of common law dated from 1870 and reached zenith in years before World War I).

[165] *See* M. HORWITZ, *supra* note 43, at 253-66; HURST I, *supra* note 133, at 186-89; K. LLEWELLYN, *supra* note 129, at 38-40; HURST III, *supra* note 164, at 42.

[166] "[I]n the late nineteenth century, judges were not inclined to look favorably on legislation which, like the Married Women's Property Acts, changed doctrine which judges had made the law of the land." HURST I, *supra* note 133, at 186. *Accord* K. LLEWELLYN, *supra* note 129, at 38; *cf.* Llewellyn, *supra* note 160, at 400 (statutes limited or eviscerated by wooden and literal reading and insistence on precise language).

[167] Indeed, as late as 1900, the United States Supreme Court, which had greater access to such material than state judges, declared that congressional debates were "not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897). *Cf.* HURST I, *supra* note 133, at 187; J. JOHNSON, *supra* note 77, at 78-80 (Supreme Court relied consistently on such materials only in twentieth century); Thompson v. Thompson, 218 U.S. 611, 618, 621 (1910) (majority and dissenting opinions in tort immunity case eschew reliance on materials). *See generally* T. SEDGWICK, *supra* note 132, at 241-47 (contemporaneous treatise stating that legislative intent was to be gleaned only from statutory words).

tive intent by considering possible consequences of specific interpretations.[168]

An additional theme in nineteenth century judicial decisionmaking was the courts' reluctance to intervene in the private family.[169] Judges hesitated to interfere with familial interactions, principally because domestic life was viewed as sacred, delicate, altruistic, and certainly not for public scrutiny.[170] This reticence was manifested in jurists' refusal to criminalize interspousal activity which would have been illegal between strangers or to treat as legally cognizable disputes among family members involving domestic relations.[171] Most telling, however, was the courts' reluctance to legalize relations between husbands and wives in property and contract, although the Married Women's Acts provided much more explicitly for such interspousal interaction.[172]

Two propositions follow if legislators were seen as "lawmakers" and judges as "law interpreters." First, the common law could only be changed by statute, because judicial alteration would be lawmaking. Second, courts read statutes modifying the common law narrowly and with demanding specificity. Accordingly, predicating interspousal tort litigation on liberal construction of broad enactments would require courts to add words to legislation and, thus,

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[168] *See* HURST III, *supra* note 164, at 42; HURST I, *supra* note 133, at 186 (application of derogation canon). The canon's application is revealing. As with most tenets of statutory construction, an equally persuasive counter-rule could have been invoked to yield the opposite conclusion as to legislative intent. One is that remedial legislation is to be interpreted liberally. For the modern exposition of this, see Llewellyn, *supra* note 160. *See also* T. SEDGWICK, *supra* note 132, at 231, 309 (consideration of effects proper when legislation ambiguous but not when clear). Several writers have contended that the judicial treatment of statutes reviewed often was obstructive and narrowed the legislation's intended effects. *See* HURST I, *supra* note 133, at 186-88; K. LLEWELLYN, *supra* note 129, at 38-39.

[169] Courts were also said to have "privatized" or "delegalized" the family. For a comprehensive discussion of these phenomena, see Olsen, *supra* note 65, at 1504-07. *See also* C. MACKINNON, *supra* note 146, at 83-90; Taub & Schneider, *supra* note 94; MacKinnon, *supra* note 146; Polan, *supra* note 146; Powers, *supra* note 65, at 70-88. *Cf.* R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 144 (1976) (familial relationships governed by "law of the jungle" reflected in state noninterference with "exploitation of power advantages within the family").

[170] For a comprehensive analysis, see Olsen, *supra* note 65, at 1504-07.

[171] For a tort immunity case articulating these views of the family, see Abbott v. Abbott, 67 Me. 304, 306-09 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980).

[172] The Acts, discussed *supra* notes 66-114 and accompanying text, expressly legalized relations in contract and property between husbands and wives during the nineteenth century but only legalized tort actions in the twentieth century. *See supra* note 75. *Cf.* N. BASCH, *supra* note 9, at 200-23 (judicial reluctance to legalize husband-wife relations).

to make law.[173]

An additional explanation for the courts' treatment of immunity is the idea of "judicial de-radicalization,"[174] meaning that courts consciously undermined clear efforts of legislatures to prescribe interspousal tort suits.[175] The de-radicalization concept cannot be sustained, however, given the imprecise language and purposes of the Married Women's Acts, as well as the difficulty of securing reliable evidence pertaining to the passage and judicial treatment of the Acts.[176]

Other important reasons for the courts' resolution of the interspousal immunity issue pertain to prevailing societal images of females, wedlock, wives, and the family. These images—of a world split into a superior, public, legalized sphere occupied by males and an inferior, private realm without law to which women were relegated; of females as weak, inferior beings who needed men's protection; of marriage and the family as private, altruistic and sacred—often were articulated expressly in the cases.[177] Most signifi-

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[173] If judges construing statutes generally considered it improper to consult legislative history but appropriate to discern legislative intent by applying canons and public policy, it should not be surprising that these principles were employed when courts analyzed the Married Women's Acts. Moreover, if jurists were reluctant to recognize interspousal interactions in property and contract, clearly provided for in statutes, they would have been even less willing to permit tort claims. Although courts currently treat tort immunity almost exclusively as a common-law policy issue, such treatment might have appeared even more inappropriate to late nineteenth century judges. *But cf.* text accompanying *supra* notes 159-60 (judges from 1800 to 1850 viewed themselves as "policymakers").

[174] *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 270-80 (1978) (explanation of idea). *Cf.* P. RABKIN, *supra* note 10, at 123; Johnston, *supra* note 5, at 1069 (context of judicial treatment of Acts).

[175] *See, e.g.*, Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 28, 30, 33, *rev'd*, 89 N.Y. 644 (1882). *Cf.* Crowell v. Crowell, 180 N.C. 516, 524, 105 S.E. 206, 210 (1920); N. BASCH, *supra* note 9, at 202-03, 206-07 (later allegations of judicial obstructionism).

[176] *See* P. RABKIN, *supra* note 10, at 123; Chused, *supra* note 21, at 1400 n.211; Johnston, *supra* note 5, at 1069. For a discussion of the Acts' language and purposes and evidence regarding their enactment, see *supra* notes 66-114 and accompanying text. There is widespread agreement, however, that courts narrowly read the Acts. *See supra* note 99.

[177] *See* cases cited *supra* notes 145-56. *See also* Barber v. Barber, 62 U.S. (21 How.) 582, 589 (1858) (wife's identity merged into husband's); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (discussing propriety of wife remaining in private sphere; impropriety of wife having occupation distinct from husband in public sphere); Maynard v. Hill, 125 U.S. 190, 210-14 (1888) (holding marriage more than mere contract; not subject to normal contractual rules, thereby enabling husband to avoid obligations to abandoned wife); Tinker v. Colwell, 193 U.S. 473, 485 (1904) (wife as husband's property); Muller v. Oregon, 208 U.S. 412, 421 (1908) ("woman has always been dependent upon

cant, however, probably was the merger fiction, especially insofar as it conveniently captured those images and thereby essentially embodied the underlying social relations that governed the nineteenth century patriarchal family.[178] Indeed, when jurists observed existing society, it may well have been inconceivable to them that legislatures could have intended to intrude upon a husband's control over his wife's body, the most delicate area of the sacrosanct institution of marriage.[179]

The judiciary was an all male elite, few of whom were sympathetic to alterations of the status quo, especially the potential subversion of traditional gender roles that interspousal tort litigation might have represented.[180] Nevertheless, most judges probably

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man"). *Cf.* Polan, *supra* note 146; Powers, *supra* note 65, at 72-73; Taub & Schneider, *supra* note 94 (discussions of Supreme Court cases). *Cf.* Minow, *supra* note 9, at 840-51; Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1523-34 (1986) (recent analysis of *Bradwell* cautioning against overemphasizing importance). For discussion of societal views of women, marriage, wives, and the family at the beginning of this period, see *supra* notes 65, 89-92, 103, 106 & 109 and accompanying text. These views of marriage and the family as private and of the separate spheres probably reached their apogee in the Victorian era. By approximately 1890, however, the images were beginning to change. After 1890 more single and married women attended college and entered the workforce; social and economic changes drew together the private, family sphere and the legal, public sphere; and most entities within the emerging middle class experienced a new self-consciousness. *See generally* E. FLEXNER, *supra* note 96, at 182-247; S. EISENSTEIN, GIVE US BREAD BUT GIVE US ROSES: WORKING WOMEN'S CONSCIOUSNESS IN THE UNITED STATES, 1890 TO THE FIRST WORLD WAR (1983); A. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 5-6 (1965); R. SENNETT, FAMILIES AGAINST THE CITY: MIDDLE CLASS HOMES OF INDUSTRIAL CHICAGO, 1872-1890 (1970); R. WIEBE, *supra* note 106, at 111-32. *Cf.* E. PLECK, *supra* note 40, at 69-120 (three reform efforts against domestic violence defining it as crime requiring stern punishment reached apex in last third of nineteenth century); Minow, *supra* note 9, at 874-83 (women factory and volunteer workers created ethic of caring and new roles but not individual rights within family).

[178] *See* N. BASCH, *supra* note 9, at 27, 38-41, 68-89, 200-03, 224-32 (merger fiction); Olsen, *supra* note 65, at 1504-07; Unger, *supra* note 148, at 623-24 (nineteenth century family). For discussion of the correlation between legal doctrine and underlying social relations, see C. MACKINNON, *supra* note 146, at 83-90; Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829 (1983).

[179] The specter of wives invoking the tort litigation process and hauling their husbands before public tribunals to divulge the intimacies of their lives, thereby striking at the essence of marriage, all to the detriment of individual families and the society, must have been unimaginable to most judges. Even if judges could have overcome their incredulity, they probably would have found the effects of interspousal tort litigation more deleterious than beneficial.

[180] *See* N. BASCH, *supra* note 9, at 208, 225 (pervasive maleness of legal system at that time). *Cf.* Polan, *supra* note 146, at 301 (same today).

were not attempting consciously to suppress women but believed in a subtler, more paternalistic way that denying wives suits against their husbands was best for the individual women and society.[181]

Developments in tort law are less important to resolution of the early immunity cases than are the factors discussed above because torts had only begun to emerge as a discrete field of jurisprudence and because the immunity opinions rarely mentioned tort principles.[182] Nonetheless, insofar as a field which can be denominated torts is discernable, much in the area comported with judicial treatment of immunity.

Torts "was essentially a common law subject, one whose rules and doctrines had been articulated and developed by judges and academicians [so that] legal problems in Torts were 'solved' primarily by the application of common-law principles . . . rather than through legislation."[183] The prevailing tenor of tort jurisprudence, which could be characterized fairly as one of constricted liability, was evidenced by the rise and consolidation of the negligence concept. During this period, jurists formulated modern negligence and expanded the scope of its coverage. Strict liability and intent faded in significance, while nuisance essentially disappeared.[184] Correspondingly, courts shifted the burden of proof from

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[181] For example, see the paternalistic public policies enunciated for recognizing immunity in the cases cited *supra* notes 145-56. Some have suggested that courts' treatment of immunity was an exercise in male chauvinism, whereby judges manipulated available legal mechanisms to perpetuate the subjugation of wives. *See, e.g.*, Crowell v. Crowell, 180 N.C. 516, 523-24, 105 S.E. 206, 210 (1920); *see also* L. KANOWITZ, *supra* note 5, at 40; Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421, 423 (1925). But this view is "reductive if not somewhat ahistorical" and ignores other realities, such as "why male legislators wanted to change the law in the first place." *See* N. BASCH, *supra* note 9, at 225-26.

[182] *See* G. WHITE, *supra* note 124, at 3-62 (discussing coalescence of tort law). There is widespread agreement about the general ideas in this account, but controversy and revision have attended recent analyses of numerous specifics discussed. A reliable account can be afforded by relying principally upon M. HORWITZ, *supra* note 43; G. WHITE, *supra* note 124, at 3-62; and Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

[183] G. WHITE, *supra* note 124, at 60. This account of tort law dovetails with the judges' view of their roles vis-a-vis legislatures. *See supra* notes 159-67 and accompanying text. "[I]n the late nineteenth century, judges were not inclined to look favorably on legislation which, like the Married Women's Property Act, changed doctrine which judges had made the law of the land." HURST I, *supra* note 133, at 186.

[184] *See* G. WHITE, *supra* note 124, at 61. For history of the negligence idea, see M. HORWITZ, *supra* note 43, at 85-99; W. PROSSER & W.P. KEETON, *supra* note 2, § 28, at 161; G.

the defendant to show that he or she exercised extraordinary care to the plaintiff to prove that defendant failed to exercise ordinary care.[185] Judges also recognized, or emphasized, the "unholy trinity" of defenses: contributory negligence, assumption of risk, and the fellow-servant doctrine.[186] Moreover, judicial treatment of the remaining immunities paralleled that of interspousal immunity. In this period, parent-child immunity was created, and no jurisdiction allowed such intrafamily litigation;[187] charitable immunity was recognized for the first time and by the overwhelming majority of courts asked to permit claims against charities;[188] and the United States and all state governments rarely consented to be sued.[189]

WHITE, *supra* note 124, at 3-19. For discussions of the tenor of tort law, characterizing it as one of constricted liability, see M. HORWITZ, *supra* note 43, at 98-99; W. PROSSER & W.P. KEETON, *supra* note 2, § 80, at 571-72; § 65, at 451-62; § 68, at 480-98; G. WHITE, *supra* note 124, at 61-62. *But cf.* L. FRIEDMAN, *supra* note 37, at 264 n.37, 417-27; Schwartz, *supra* note 182, at 1720 (nineteenth century torts system less favorable to industry and more favorable to victims than had been thought).

[185] *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292, 298 (1850); *but cf.* M. HORWITZ, *supra* note 43, at 89-91 (*Brown* given exaggerated significance).

[186] Chief Justice Shaw has been credited with advancing American recognition of contributory negligence in *Brown*, 60 Mass. at 292 n.181, *see* Schwartz, *supra* note 182, at 1757-67, and the fellow-servant and assumption of risk doctrines in Farwell v. Boston & Worcester Ry., 45 Mass. (4 Met.) 49, 57 (1842). *See* L. FRIEDMAN, *supra* note 37, at 263-64; M. HORWITZ, *supra* note 43, at 209-10; W. PROSSER & W.P. KEETON, *supra* note 2, § 80, at 571-72 (fellow-servant doctrine). *See* L. FRIEDMAN, *supra* note 37, at 263; M. HORWITZ, *supra* note 43, at 210 (assumption of risk). *Cf.* L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957) (Shaw's biography). For discussion of the history of the "unholy trinity" see L. FRIEDMAN, *supra* note 37, at 263-64; W. PROSSER & W.P. KEETON, *supra* note 2, § 80, at 571-72; § 65, at 451-62; § 68, at 480-98. *Cf.* M. HORWITZ, *supra* note 43, at 95-96; Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (history of contributory negligence); Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51-58 (1967) (history of fellow-servant rule); G. WHITE, *supra* note 124, at 41-45 (history of assumption of risk). These developments are important examples of tort liability's constricted tone, *see supra* note 184, and of how courts created an interrelated doctrinal scheme, *see* G. WHITE, *supra* note 124, at 61. Finally, it should be noted that before 1900 the "primary function of tort liability had been seen as one of punishing or deterring blameworthy civil conduct," not compensating injured persons. G. WHITE, *supra* note 124, at 62.

[187] *See* Hollister, *supra* note 11, at 494; *cf.* F. HARPER, *supra* note 27, § 8-11, at 573; W. PROSSER & W.P. KEETON, *supra* note 2, § 122, at 904-07 (discussing history of parent-child immunity).

[188] *See* F. HARPER, *supra* note 27, § 29.16, at 756-63; W. PROSSER & W.P. KEETON, *supra* note 2, § 133, at 1069-70.

[189] *See* F. HARPER, *supra* note 27, § 29.1-29.4, at 596-618; W. PROSSER & W.P. KEETON, *supra* note 2, § 131, at 1032-56.

(ii) 1910: Thompson v. Thompson.[190] Every court requested to allow interspousal personal injury actions between 1863 and 1913 refused. By the end of this period, however, certain considerations relevant to tort immunity had changed. For example, most legislatures substantially amended their Married Women's Acts, significantly eroding coverture. Nevertheless, it was a transitional period: even as voters in California and Washington approved female suffrage, the supreme courts of each jurisdiction simultaneously rejected interspousal tort litigation.[191] It should not have been surprising, therefore, that in 1910, when a four-Justice majority of the United States Supreme Court recognized immunity in the District of Columbia, Justices Harlan, Holmes, and Hughes would join in a strong dissent.[192] The opinions in *Thompson* represented the "moment" of legal change for the longstanding immunity concept.[193] The majority determination constituted immunity's zenith; the idea previously had been acknowledged or reaffirmed in twelve states. The dissenting decision was the first substantive break with immunity, marking the commencement of its erosion, a process that continued throughout the twentieth century.[194]

Justice Day's majority opinion reiterated most of the rationales for rejecting interspousal tort claims articulated in prior case law. After announcing the common-law existence of a substantive rule of tort immunity,[195] the jurist analyzed the District of Columbia Married Women's Act which arguably prescribed interspousal tort suits as clearly as any contemporaneous measure. He stated that "interpretation of the law [is] the only function of the courts"; policymaking was for Congress; and the Court should construe the

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[190] 218 U.S. 611 (1910).

[191] *See* E. FLEXNER, *supra* note 96, at 263-66 (California and Washington suffrage approval); Peters v. Peters, 156 Cal. 32, 37-38, 103 P. 219, 221 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); Schultz v. Christopher, 65 Wash. 496, 501, 118 P. 629, 631 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), and *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984) (both states rejecting tort litigation).

[192] *Thompson*, 218 U.S. at 619-24.

[193] I use the idea here to mean the point of dramatic change in a doctrinal legal concept. For other definitions, see A. WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY 93-131 (1984); Feinman, *supra* note 178.

[194] Of course, there is in Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33, *rev'd*, 89 N.Y. 644 (1882), discussed *supra* note 118, in which an intermediate appellate court would have permitted interspousal suits, but it was summarily reversed.

[195] *Thompson*, 218 U.S. at 614-15.

enactment "with a view to effectuate the legislative purpose."[196] Justice Day observed that "such radical and far-reaching changes" in the common law's "policy of centuries" as the abolition of immunity "should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."[197] He then briefly considered the statutory terminology which empowered married women to sue anyone separately "for torts committed against them, as fully and freely as if they were unmarried."[198] The Court found that the statute was meant "to allow the wife, in her own name, to maintain actions of tort, which, at common law, must be brought in the joint names of herself and her husband."[199]

Justice Day next purported to interpret the measure and examine the legislative intent underlying the enactment but failed to consult any relevant legislative materials.[200] Instead, he "strictly construed" the Act, invoking several propositions closely related to the derogation canon.[201] Justice Day also appealed to public policy. He enumerated several "possible evils" of interspousal tort litigation that he thought Congress could not have "intended"—connubial disharmony, exposure of conjugal differences to public scrutiny, and frivolous and trivial litigation—while explicitly acknowledging the impropriety of considering such potential effects.[202]

The jurist found that provision of "adequate grounds for relief under the statutes of divorce and alimony" also evidenced congressional intent not to prescribe these suits.[203] Justice Day concluded by asserting that Congress could not have intended "to revolutionize the law governing the relation of husband and wife as between

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[196] *Id.* at 618 (first two propositions); *id.* at 615 (third proposition).

[197] *Id.* at 618.

[198] *Id.* at 615-16.

[199] *Id.* at 617.

[200] Justice Day mentioned no secondary sources, such as committee reports, although the Act had passed in 1901. *See id.* at 615-19.

[201] A helpful example is the proposition in the text accompanying *supra* note 197.

[202] "The possible evils of such legislation might well make the lawmaking power hesitate to enact it." *Id.* at 618 (Harlan J., dissenting). *See also id.* at 617-18 (enumeration of evils). Justice Day acknowledged the impropriety of considering these evils by stating that "interpretation of the law is the only function of the courts," and that "[w]hether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony" is a question properly "addressed to the legislative, not the judicial branch of the Government." *Id.* at 618.

[203] *Id.* at 617, 619.

themselves."[204] In short, the majority opinion epitomized the reasoning processes of courts that had previously addressed immunity.

Justice Harlan, in dissent, used similar and equally cryptic methods to reach the contrary result. He agreed that a judge's "duty is only to declare what the law is," proclaiming that responsibility for the "mere policy, expediency, or justice of legislation" must remain "with the legislative department, so long as it keeps within constitutional limits."[205] Justice Harlan, however, accused the majority of making law and of discerning congressional intent by improperly considering possible impacts of the enactment. The jurist remarked that, if the statute's phraseology led to undesirable public policy results, it was outside the Court's province "to ward off the dangers feared or the evils threatened by a judicial construction that [would] defeat the plainly-expressed will of the legislative department."[206] He declared "mere construction" unnecessary when the language was clear, thus vitiating the need to examine congressional intent or secondary legislative materials.[207]

Justice Harlan scrutinized the Act's text and listed the indicia of legal status afforded married women, especially their capacity to sue in tort. He observed that "Congress, by these statutory provisions [destroys] the unity of the marriage association as it had previously existed [, making] a radical change in the relations of man and wife as those relations were at common law in this District," and concluded that Congress had prescribed interspousal tort litigation.[208]

Why was *Thompson* decided in this manner? The explanations discussed above for previous recognition and reaffirmation of tort immunity appear applicable to the majority determination, as Justice Day's reasoning process attests.[209] The most important factors

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[204] *Id.* at 619.

[205] *Id.* at 621 (Harlan, J., dissenting).

[206] *Id.* at 621; *see generally id.* at 621-24 (accusations).

[207] *Id.* at 621; *cf. supra* note 132 ("plain meaning" concept might allow court to consider only words of Act); text accompanying *supra* note 200 (*Thompson* majority consulted no secondary sources).

[208] *See id.* at 621-23; *id.* at 622 (quotation); *id.* at 623 (conclusion). Thus, the authors of the majority and dissenting opinions employed similar, equally cryptic approaches to reach opposite results. The majority's conclusions as to what Congress intended are only marginally less defensible than the dissent's.

[209] *See supra* notes 159-89 and accompanying text (explanation of uniform tort immunity

pertain to broad trends in nineteenth century judicial decision-making, especially jurists' perspectives on their functions when treating legislation.[210] Many judges continued to hold those views in 1910, as may have the four jurists who comprised the majority. Each has been characterized as a traditionalist; each analyzed closely and read narrowly social reform measures.[211]

The dissenting opinion is more difficult to explain, however, because it abruptly departed from prior judicial treatment of immunity. The most significant explanations implicate judicial decision-making, especially courts' roles in handling social welfare legislation. The three Justices generally deferred to public policy choices of legislatures and acquiesced in their reform efforts, refusing to read restrictively social welfare measures. They also construed generously enactments, even searching for and implementing purposes not expressed clearly, so as to effectuate affirmatively the statutes' reformist goals.

For example, Justice Harlan was a staunch proponent of separation of powers, and the "uncompromising faith that the legislature, not the judiciary, should administer political affairs infused all

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treatment). Compare the similar reasoning processes of courts recognizing immunity, *supra* notes 124-58 and accompanying text, and of Justice Day, *supra* notes 195-204 and accompanying text.

[210] *See supra* notes 159-65 and accompanying text (judges' views of their role in interpreting legislation). For many judges the common law remained a "brooding omnipresence." *See* Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). *Cf. supra* note 164 (scholars dedicated to common law's celebration reached zenith in years before World War I).

[211] L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969 (1969) (five volumes), provides helpful biographical analyses of each justice. *See id.* at 1773-89 (Day); *id.* at 1847-63 (Lurton); *id.* at 1719-36 (McKenna); *id.* at 1633-57 (White); *see also* R. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH (1981) (biography); M. MCDEVITT, JOSEPH MCKENNA: ASSOCIATE JUSTICE OF THE UNITED STATES (1946) (biography); J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920 (1978) (additional analysis of justices). The nineteenth century theme of judicial nonintervention in the private family, *see supra* notes 169-72 and accompanying text, and the earlier visions of women, marriage, wives, and the family, *supra* notes 177-81 and accompanying text, seem somewhat less important to the *Thompson* majority. But patriarchical pronouncements are present in *Thompson* and in other contemporaneous opinions the four justices joined. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (holding constitutional Oregon statute limiting hours women could work); Tinker v. Colwell, 193 U.S. 473 (1904) (holding that assault to wife was injury to husband's property) (superseded by statute as stated in *In re* Quezada, 718 F.2d 121 (5th Cir. 1983), *cert. denied sub nom.* Kelt v. Quezada, 467 U.S. 1217 (1984)).

other areas of his legal thinking."[212] Correspondingly, Justice Holmes "advocated 'purposive' or 'goal-oriented' interpretation" of statutes.[213] Significantly, when legislation did not provide for a particular contingency, Justice Holmes looked beyond the measure's express language to ascertain and implement purposes not mentioned explicitly, declaring the failure to do so a dereliction of judicial duty:

> A statute may indicate . . . a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute . . . may

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[212] G. WHITE, *supra* note 162, at 130-31. He also believed that national and state governments possessed broad powers, often viewing expansively the regulatory authority delegated to administrative agencies. Justice Harlan thought as well that the federal government should protect the rights of disadvantaged minorities, particularly blacks. These ideas were captured best in stinging dissents, which accused the majority of amending constitutions and statutes through judicial "legislation" or "construction." *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting) (concluding that "courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives"). *Accord* G. WHITE, *supra* note 162, at 130-31, 138-45. Indeed, the accusations were similar to those in the *Thompson* dissent. In short, his opinion seems premised principally on solicitude for integrity of the branches of government. *See* 2 L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1285. I rely substantially here on G. WHITE, *supra* note 162, at 128-35; 2 L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1281-95; and J. SEMONCHE, *supra* note 211, at 3-276.

[213] Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899), *cited in* R. SUMMERS, *supra* note 161, at 154. Justice Holmes had been a member of the Supreme Court since 1902 after sitting on the Massachusetts Supreme Court for twenty years. Although more has been written about Holmes than any other Justice, his jurisprudence defies easy description. *See* White, *Looking at Holmes in the Mirror*, 4 LAW & HIST. REV. 439 (1986) (recent compilation and analysis). Nonetheless, the jurist consistently opposed invalidation of social welfare enactments, "finding strength in his Marshallian conception of a Constitution, his skepticism, and the liberation from parochialism wrought by a grandly synoptic view of legal history." 3 L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1759. Justice Holmes respected the wishes of the people as expressed through their elected representatives and was unwilling to read narrowly reform measures, regardless of his feelings as to the advisability of the specific legislative activity and in the belief that law must reflect existing community values. *See id. See also* G. WHITE, *supra* note 162, at 150-77, 425-26; White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971). *Cf.* H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984) (ongoing debate over Holmes).

> not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.[214]

Justice Hughes shared the perspectives of Justices Harlan and Holmes on numerous considerations relevant to *Thompson*.[215] Hughes was receptive to legislative reform endeavors, refusing to read restrictively social welfare measures;[216] he viewed broadly governmental authority, often construing expansively agency regulatory power;[217] and he supported civil liberties.[218]

Thus, one plausible explanation for the dissenters' treatment of interspousal tort immunity is deference to the legislature. Justice Harlan believed that "courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives."[219] It seems logical in *Thompson* for the Justice (1) to have implemented that will by reading receptively the substantially amended Act and by finding its terminology sufficient to permit interspousal tort litigation, and (2) to have castigated the majority for frustrating Congress' clearly enunciated

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[214] Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908). For helpful discussion of Holmes' use of this technique, see Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 558 (1982); *cf.* Landis, *Statutes and the Sources of Law*, 2 HARV. J. LEGIS. 7, 15-17 (1965) (technique's application to Married Women's Acts); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (contemporaneous advocacy of technique's use). Justice Holmes has also been characterized as relatively indifferent to the rights of minorities. Thus, his vote in *Thompson* appears to be based primarily on general willingness to acquiesce in, and even effectuate, the will of the populace as articulated in legislation.

[215] Like Harlan, Hughes was a former governor, joining the Court at the end of two terms as New York's chief executive. His gubernatorial record was distinctly "progressive." For thorough accounts of Hughes, see D. DANELSKI & J. TULCHIN, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES (1973); L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1893-1915; M. PUSEY, CHARLES EVANS HUGHES (1951); and G. WHITE, *supra* note 162, at 200-29.

[216] *See* Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 9 (1967).

[217] *See* 3 L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1899; M. PUSEY, *supra* note 215, at 215-16; J. SEMONCHE, *supra* note 211, at 321.

[218] *See* 3 L. FRIEDMAN & F. ISRAEL, *supra* note 211, at 1906; Pusey, *Mr. Chief Justice Hughes*, in MR. JUSTICE 166-69 (A. Dunham & P. Kurland eds. 1956); Freund, *supra* note 216, at 41-42.

[219] Plessy v. Ferguson, 163 U.S. 537, 552, 558-59 (1895) (Harlan, J., dissenting). *Accord* Thompson v. Thompson, 218 U.S. 611, 621 (1910) (Harlan, J., dissenting).

will and considering the measure's potential impacts.[220]

More limited explanations pertaining to trends in early twentieth century judicial decisionmaking also can be proffered. Some courts evidenced less reluctance to intervene in, legalize, and deprivatize the family. Jurists recognized more areas of potential criminal and civil liability, legalizing, for instance, much interspousal interaction in property and contract.[221]

The dissenters' views about women may explain their decision. Justices Harlan and Hughes generally were sympathetic to disadvantaged minorities, although it is unclear whether this concern included women.[222] Justice Holmes was familiar with the history of wives' legal status,[223] but his judicial opinions evinced ambivalence toward women's rights. For example, in 1923 Justice Holmes simultaneously upheld statutory protection for female workers and opined that it would take "more than the Nineteenth Amendment to convince me that there are no differences between men and women."[224]

Although the three jurists probably appreciated the underlying realities of wife battering, they may have believed it improper to intervene in marriages on behalf of one spouse, absent legislative prescription, or to accord wives all the individual rights of males

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[220] Similarly, if Justice Holmes thought that judges were obligated to effectuate the people's wishes as expressed in legislation, even when particular situations were not provided for specifically, the jurist might have dissented, because he viewed the statutory conferral of particular indicia of legal personhood as an expression of congressional intent to alter relations between husbands and wives or to effect a change in wedded females' legal status and, thus, sufficient to allow interspousal tort suits. Moreover, the language of the act at issue in Thompson v. Thompson, 218 U.S. 611, 615-16 (1910), came as close to permitting interspousal tort suits as any contemporaneous act. Justices Harlan and Holmes had evinced willingness to acquiesce in legislative reform efforts in many contexts. A famous example was Lochner v. New York, 198 U.S. 45, 65, 74 (1905) (Harlan, Holmes, JJ., dissenting).

[221] Two courts that retained interspousal tort immunity recognized interspousal suits over property. *See* Peters v. Peters, 156 Cal. 32, 36, 103 P. 219, 221 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 691, 376 P.2d 65, 70 (1962); Henneger v. Lomas, 145 Ind. 287, 294, 44 N.E. 462, 464 (1896).

[222] *See supra* notes 212 & 215 (Harlan's and Hughes' concern for minorities).

[223] *See* Holmes, *Agency*, 4 HARV. L. REV. 345, 352-53 (1891) (writing on history of wives' legal status illustrates familiarity).

[224] Adkins v. Children's Hosp., 261 U.S. 525, 569-70 (1929) (Holmes, J., dissenting). Justice Holmes' refusal to invalidate women's "protective legislation" in *Adkins*, and in Muller v. Oregon, 208 U.S. 412 (1908), seems premised more on deference to legislative reform than concern for women's rights.

and single women.[225] Instead, they may have seen females as vulnerable beings who might need the protection of special legislation.[226] These viewpoints may be reflected in their acquiescence in patriarchal Supreme Court pronouncements but are captured best in *Muller v. Oregon*,[227] agreed to by Justices Harlan and Holmes in 1908, and adopted in *West Coast Hotel v. Parrish*[228] by Justice Hughes three decades later:

> [W]oman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . [so] that her physical well being becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . . [T]here is that in her disposition and habits of life which will operate against a full assertion of [contractual] rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Hence she was "properly placed in a class by herself and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained."[229]

Other general currents in judicial decisionmaking at this time are less applicable to the dissent. Around 1880 legislatures had assumed responsibility for general policymaking, so that after the turn of the century courts read measures more positively and

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[225] Nonetheless, the jurists might have been amenable to helping the injured wife by providing civil recourse. For discussion of judicial intervention in marriages, *see supra* notes 169-72 and accompanying text; *infra* notes 282-85 and accompanying text; *cf. infra* note 412 and accompanying text (discussion of wives as rights-holders); Minow, *supra* note 9 (criticizing traditional family law view of wives as rights holders).

[226] *See* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 653-65 (1981) (discussing special treatment legislation).

[227] 208 U.S. 412 (1908). The Supreme Court made other patriarchal pronouncements in Tinker v. Colwell, 193 U.S. 473, 485 (1904) (holding that assault to wife was injury to husband's property) (superseded by statute as stated in *In re* Quezada, 718 F.2d 121 (5th Cir. 1983), *cert. denied sub nom.* Kelt v. Quezada, 467 U.S. 1217 (1984)), in which Harlan joined, and MacKenzie v. Hare, 239 U.S. 299, 311 (1915) (domestic and international policy give dominance to husband), in which Holmes joined.

[228] 300 U.S. 379 (1937).

[229] *Id.* at 394-95. Of course, the Justices may not have considered the pronouncements patriarchal and what they agreed to in an opinion may not actually reflect their views.

pragmatically, by, for instance, relying less on abstract canons of statutory construction.[230] Moreover, after 1900 some judges and academicians increasingly criticized mechanical or formalistic judicial decisionmaking perceived as antidemocratic or as hindering legislative reform efforts.[231] Accordingly, the critics offered numerous prescriptions. For example, courts were admonished to defer to legislative policymaking.[232] But these developments probably had minimal impact on the Supreme Court dissenters; in fact, the Justices may well have influenced or even anticipated the developments. Although Justice Harlan has been characterized as the quintessential transitional jurist between the nineteenth and twentieth centuries, little probably could have influenced him to modify his long held views regarding statutory construction and the branches of government.[233] Moreover, Justice Harlan's opinion in *Thompson* was as formalistic as the majority determination.[234] Similarly, Justice Holmes, in "magisterial detachment," had firmly held convictions respecting the judiciary's obligation to implement the sovereign's will as expressed through legislation.[235]

Additional, less significant, reasons for the dissent pertain to contemporary societal visions of women, wedlock, wives and the family. These images had changed by 1910: marriage was seen as less irrevocable and wives as more independent of their spouses.[236]

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[230] *See* HURST I, *supra* note 133, at 186-88; HURST III, *supra* note 164, at 41-42.

[231] Roscoe Pound, in articles, such as *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), was an important proponent of these views. For helpful discussion of these developments, see G. WHITE, *supra* note 124, at 116-19; White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1000-12 (1972).

[232] *See* G. WHITE, *supra* note 162, at 145-46; G. WHITE, *supra* note 124, at 116-19; White, *supra* note 231, at 1000-12 (discussing prescriptions and judicial deference); *cf.* H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS xii, at 710 (2d ed. 1911) (contemporaneous reference source including prescriptions); Pound, *supra* note 214 (contemporaneous advocacy of applying statutes in way *Thompson* dissent may have).

[233] "With the end of Harlan's tenure, American appellate judging entered the twentieth century." G. WHITE, *supra* note 162, at 146. Indeed, Harlan was one of the first judges to use "modern" statutory interpretation techniques.

[234] Compare the dissenting and majority opinions in *Thompson*, 218 U.S. 611. *Cf.* K. LLEWELLYN, *supra* note 129, at 40-41 (temporal, geographical variability in opinion writing); *supra* note 166 (formalism discussion).

[235] Indeed, Holmes apparently affected these developments with contributions such as his dissent in Lochner v. New York, 198 U.S. 45, 74 (1905), and advocacy of "goal oriented" statutory interpretation, *see supra* notes 213-14.

[236] *See* S. EISENSTEIN, *supra* note 177, at 13, 19 (eight times as many women worked in

The modified visions may have been held by the three dissenters, as evidenced in Justice Harlan's proclamation that Congress had radically altered the common-law relation of husband and wife. Indeed, when the dissenters considered contemporary social conditions, it might have seemed plausible to them that the legislative branch intended to end coverture.[237]

The factors discussed above seem to have more importance for the *Thompson* dissent than tort jurisprudence. Indeed, the dissenting opinion does not explicitly mention tort law.[238] Developments in the field, which had coalesced by 1910, yield a mixed picture. Substantive tort doctrine differed minimally from that of the nineteenth century,[239] and most of the change originated in the legislature and not in the judiciary. For example, the New York Assembly initially created a cause of action for violation of the right of privacy in 1903 but only after the state's highest court had refused to do so the preceding year.[240] New York also adopted the nation's first state-level workers' compensation scheme in 1910,[241] in part to ameliorate the harsh effects of the judicially created "unholy trinity" of defenses.[242] Accordingly, the dissent appears less explicable in terms of tort law.

In summary, *Thompson* was a watershed for interspousal tort immunity. The majority opinion marks the rule's apogee,[243] while

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1910 as 1890, but marriage was still seen as duty); W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA x (1967) (1880-1920 time of decisive change in public attitudes on divorce and 1900-1915 crucial because thereafter nothing could control the rising divorce rate); R. SENNETT, *supra* note 177, at 208-13 (decline in father's home authority); R. WIEBE, *supra* note 106, at ch. 5 (all within new middle class, including women, experienced growth of self-consciousness).

[237] *See supra* notes 219-20 & 225-29 and accompanying text (deference to legislature more important than women's rights).

[238] *See* Thompson v. Thompson, 218 U.S. 611, 621 (1910) (Harlan, J., dissenting).

[239] *See supra* notes 182-89 and accompanying text (describing tenor of constricted liability).

[240] Act of April 6, 1903, ch. 132, § 2, 1903 N.Y. Laws; Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545, 64 N.E. 442, 443 (1902).

[241] Act of July 18, 1911, ch. 674, 1910 N.Y. Laws. This legislation was enacted at then Governor Hughes' instigation. However, this initiative was only marginally more responsive to workers' needs than those of employers. L. FRIEDMAN, *supra* note 37, at 587-88. Moreover, the court of appeals declared the New York statute unconstitutional. *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 317, 94 N.E. 431, 448 (1911).

[242] L. FRIEDMAN, *supra* note 37, at 587-88.

[243] Prior to *Thompson*, 12 jurisdictions had recognized tort immunity, but no jurisdiction had permitted interspousal tort litigation. The *Thompson* majority probably afforded im-

the dissenting opinion presaged the abrupt, substantial departure from prior precedent.[244]

(iii) 1914-1920. From 1914 until 1920, courts in seven jurisdictions recognized interspousal tort claims, while courts in a comparable number of states refused to do so.[245] Courts that permitted the claims reached that result in one of three ways.

First, every court that allowed interspousal litigation relied substantially upon the Married Women's Acts, which had been amended significantly but did not explicitly prescribe tort claims between spouses. The jurists viewed the measures in numerous ways, and most subscribed to multiple perspectives. Several judges depended primarily upon the text of the Acts which was considered adequate to permit the lawsuits.[246] Courts also analogized from statutory causes of action afforded wives against their husbands in contract or property or against third parties in those areas and torts.[247] Moreover, judges found that the Married Women's Acts (1) restored the legal status that married women had enjoyed prior to wedlock;[248] (2) ended spouses' merged identity;[249] (3) re-

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munity vitality it might not otherwise have had. *See infra* note 245 (many courts finding immunity later rely upon *Thompson*).

[244] Justice Harlan's opinion may have anticipated the departure, but the courts that initially abolished immunity relied minimally on the *Thompson* dissent.

[245] Cases recognizing interspousal tort suits were Johnson v. Johnson, 201 Ala. 41, 44, 77 So. 335, 338 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 177, 186 S.W. 832, 836 (1916); Brown v. Brown, 88 Conn. 42, 49, 89 A. 889, 892 (1914); Gilman v. Gilman, 78 N.H. 4, 5, 95 A. 657, 657 (1915); Crowell v. Crowell, 180 N.C. 516, 524, 105 S.E. 206, 210 (1920); Fiedler v. Fiedler, 42 Okla. 124, 129-30, 140 P. 1022, 1025 (1914) (styled as Fiedeer v. Fiedeer in 140 P. 1022); Prosser v. Prosser, 114 S.C. 45, 47, 102 S.E. 787, 788 (1920).

Cases rejecting interspousal tort suits were Heyman v. Heyman, 19 Ga. App. 634, 639, 92 S.E. 25, 27 (1917); Dishon v. Dishon, 187 Ky. 497, 501, 219 S.W. 794, 796, (1920), *overruled*, Brown v. Gosser, 262 S.W.2d 484, 484 (Ky. 1903); Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969); Rogers v. Rogers, 265 Mo. 200, 208, 177 S.W. 382, 384 (1915), *overruled*, Townsend v. Townsend, 708 S.W.2d 646, 649 (Mo. 1986); Butterfield v. Butterfield, 195 Mo. App. 37, 38, 187 S.W. 295, 295 (1916); Lillienkamp v. Rippetoe, 133 Tenn. 57, 64, 179 S.W. 628, 629 (1915); Keister v. Keister, 123 Va. 157, 175, 96 S.E. 315, 321 (1918), *overruled*, Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971).

[246] *See, e.g., Gilman*, 78 N.H. at 47, 95 A. at 657; *Prosser*, 114 S.C. at 47, 102 S.E. at 788.

[247] *See, e.g., Brown*, 88 Conn. at 46-47, 89 A. at 891; *Crowell*, 180 N.C. at 521, 105 S.E. at 209.

[248] *See, e.g., Johnson*, 201 Ala. at 43, 77 So. at 337; *Brown*, 88 Conn. at 47, 89 A. at 891; Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 27, *rev'd*, 89 N.Y. 644 (1882).

[249] *See, e.g.*, Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916); *Brown*, 88 Conn. at 46, 89 A. at 891; *Crowell*, 180 N.C. at 522, 105 S.E. at 209-10.

moved wives' common-law disabilities;[250] (4) invested married females with indicia of independent legal status;[251] (5) made married women equal to their husbands;[252] or (6) were meant to be remedial, and, therefore, to be interpreted liberally.[253] These determinations alone, or in various combinations, supported conclusions that wives could sue their husbands for personal injuries.

A second way that judges justified allowing interspousal tort actions was by rejecting earlier judicial treatment of immunity. These courts rhetorically criticized prior analyses of the Married Women's Acts. Several jurists even ascribed the retention of the doctrine to statutory readings so restrictive that they "interpret[ed] away" corrective legislation clearly meant to free wives from common-law disabilities.[254] Moreover, judges expressly refuted the policy contentions traditionally articulated for immunity. They found that tort claims would not be pursued in marriages when any conjugal harmony remained.[255] Instead, courts proclaimed that such suits could serve connubial peace and public policy equally well as permitting married women "to go into the criminal courts and send [their husbands] to the penitentiary or into a divorce court and publish their entire married [lives] to the world."[256] The courts also stated that the "alternative remedies" of criminal prosecution and marital dissolution provided little actual

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[250] *See, e.g., Fitzpatrick*, 124 Ark. at 167, 186 S.W. at 835; *Gilman*, 78 N.H. at 4, 95 A. at 657; *cf. Schultz*, 34 N.Y. Sup. Ct. at 30, 33 (Act's purpose to invade and dispel the common law).

[251] *See, e.g., Fitzpatrick*, 124 Ark. at 167, 188 S.W. at 833; *Brown*, 88 Conn. at 44-45, 89 A. at 890.

[252] *See, e.g., Brown*, 88 Conn. at 44-45, 89 A. at 890; Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); *cf. Fitzpatrick*, 124 Ark. at 167, 186 S.W. at 836 (Act could accord wife more rights than husband).

[253] *See, e.g.*, Fiedler v. Fiedler, 42 Okla. 124, 128, 140 P. 1022, 1024 (1914); Prosser v. Prosser, 114 S.C. 45, 47, 102 S.E. 787, 788 (1920). A few courts looked beyond the Acts' express terms, ascertained that the measures effected a change in wives' legal status, and reasoned therefrom that disabilities not eliminated explicitly or indicia of legal personality not prescribed specifically by the Acts also should be removed or granted. *See, e.g., Brown*, 88 Conn. at 45, 89 A. at 890-91; *Fitzpatrick*, 124 Ark. at 167, 186 S.W. at 835-36.

[254] *See, e.g., Fitzpatrick*, 124 Ark. at 167, 186 S.W. at 834; Crowell v. Crowell, 180 N.C. 516, 524, 105 S.E. 206, 210 (1920); *Fiedler*, 42 Okla. at 126, 140 P. at 1023.

[255] *See, e.g., Brown*, 88 Conn. at 48, 89 A. at 891-92; *Crowell*, 180 N.C. at 525, 105 S.E. at 211 (Allen, J., concurring).

[256] *Fiedler*, 42 Okla. at 130, 140 P. at 1025. *Accord* Johnson v. Johnson, 201 Ala. 41, 44, 77 So. 335, 338 (1917); *cf.* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33 (permitting tort actions would promote harmony), *rev'd*, 89 N.Y. 644 (1882).

redress to injured wives[257] and that the threat of frivolous or trivial interspousal litigation was insignificant.[258]

A third way that courts supported their determinations was with affirmative public policy arguments. The courts asserted that provision for tort suits could afford married women compensatory relief,[259] prevent breaches of the peace,[260] or punish or deter intentionally inflicted interspousal harm.[261] Several judges observed that an important purpose of courts, often enshrined in state constitutions and statutes, was to be open to all, regardless of marital status, to remedy wrongs.[262] A few jurists recognized wives' individual rights.[263] The Married Women's Acts were the principal focus of these judges, however, and none treated the immunity issue purely as a common-law policy question.[264]

A number of interrelated reasons underlie this dramatic departure from prior precedent. Considerations pertaining to judicial decisionmaking, especially to courts' perspectives on their responsibilities, appear predominant. Although numerous judges in the two decades after 1900 perceived their roles as late nineteenth century jurists did, an increasing number viewed their functions differently. Legislatures clearly had gained primary responsibility for policymaking, and "statute law had increased in reach and density," becoming the major element of legal growth. Legislation, particularly the Married Women's Acts, exhibited "sustained lines of policy" as substantial as case precedent.[265] From the turn of the

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[257] *See, e.g., Johnson*, 201 Ala. at 44, 77 So. at 338; *Crowell*, 180 N.C. at 522, 105 S.E. at 209; *Fiedler*, 42 Okla. at 130, 140 P. at 1025.

[258] *See Brown*, 88 Conn. at 48, 89 A. at 891-92. In response to the fraud rationale for prohibiting interspousal suits, discussed *supra* note 155 and accompanying text, one court concluded that the "divorce courts open the same avenues in order to recover undeserved alimony." *Fiedler*, 42 Okla. at 130, 140 P. at 1025.

[259] *See, e.g., Johnson*, 201 Ala. at 44, 77 So. at 338; *Crowell*, 180 N.C. at 523, 105 S.E. at 210; *Fiedler*, 42 Okla. at 129-30, 140 P. at 1025.

[260] *See Brown*, 88 Conn. at 49, 89 A. at 892; *Schultz*, 34 N.Y. Sup. Ct. at 28-29, 33.

[261] *See Crowell*, 180 N.C. at 524, 105 S.E. at 210; *Schultz*, 34 N.Y. Sup. Ct. at 33; *Fiedler*, 42 Okla. at 129-30, 140 P. at 1025.

[262] *See Brown*, 88 Conn. at 49, 89 A. at 892; *Fiedler*, 42 Okla. at 127, 140 P. at 1024.

[263] *Crowell*, 180 N.C. at 516, 105 S.E. at 210. *Accord Fiedler*, 42 Okla. at 129, 140 P. at 1024-25; *cf. Schultz*, 34 N.Y. Sup. Ct. at 33 (permitting interspousal tort litigation would enlarge wives' rights).

[264] *See infra* notes 351 & 363-64 and accompanying text (discussions of treatment as a common-law policy question).

[265] HURST III, *supra* note 164, at 42. *Accord* HURST I, *supra* note 133, at 187-88.

century until 1920, Congress and state legislatures passed many reform measures premised on the belief that government had an affirmative obligation to rectify newly appreciated social and economic inequities.[266] Correspondingly, courts' policymaking responsibilities diminished. The influence exerted by the common law, reflected specifically in doctrinal development and in the merger fiction, waned. Thus, judges more readily accepted statutory law, such as the Married Women's Acts, as part of the general corpus of the law and considered it less of an intrusion upon the symmetrical common-law system. In short, courts' "creative opportunity had become the subordinate, but essential, task of imaginative, firm implementation of legislative policy."[267]

Moreover, certain judges and scholars explicitly urged courts to adopt new perspectives on their roles, especially vis-a-vis legislatures. These advocates thought that the law should be responsive to changing human conditions, premised on philosophy and the new social sciences, and fairly applied to afford social justice in particular cases.[268] They generally favored contemporary reform measures and lauded improvements in the legislative process.[269]

These proponents also criticized aspects of existing judicial thinking and the substantive determinations that it yielded. They rejected static principles and mechanical legal reasoning, especially as manifested in formalistic judicial construction of legislative reform measures.[270] The jurists and academicians challenged the proposition that courts merely declared or interpreted law, by exposing them as lawmakers and their decisionmaking as a "highly politicized and idiosyncratic process."[271] Jurists who retained the

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[266] *See* HURST III, *supra* note 164, at 42; Pound, *supra* note 214, at 384 (legislative improvements); G. WHITE, *supra* note 124, at 69-70, 105; L. GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 59-81 (1988) (Progressive era transformation of child protection in families); S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 1-46 (1968) (passage of reform measures).

[267] HURST I, *supra* note 133, at 187. *Accord* G. WHITE, *supra* note 124, at 116-19; G. WHITE, *supra* note 162, at 154-56.

[268] See Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 489 (1912) (pts. 1 & 3); *see also* G. WHITE, *supra* note 124, at 69-71; G. WHITE, *supra* note 162, at 154-56; White, *supra* note 231, at 999-1012 (secondary treatment).

[269] *See* G. WHITE, *supra* note 124, at 71, 118. *See also* Bingham, *What is the Law?* 11 MICH. L. REV. 1, 109 (1912) (pts. 1 & 2); Pound, *supra* note 214, at 384.

[270] *See, e.g.*, Pound, *supra* note 214, at 384-88; Pound, *supra* note 231.

[271] G. WHITE, *supra* note 162, at 154.

common law in the face of remedial legislation or who restrictively interpreted such measures were accused of impeding progress by improperly substituting their own value choices for those of the people.[272] These observers described the ideal judge as an "architect of social policy," who appreciated the social context of decisionmaking.[273] Such a jurist understood the necessity for positive governmental activity to alleviate societal unfairness and for courts to engage in those efforts only by effectuating the policymaking authority of the legislature or remedying the judiciary's prior unresponsiveness.[274] When treating statutes, courts were admonished to read them broadly; to be attuned to such practicalities of legislative drafting as the difficulty of providing expressly for all contingencies; to implement rigorously the legislature's will where articulated explicitly; and to effectuate it even when less clearly enunciated.[275] Indeed, in 1910, Roscoe Pound boldly proposed that judges handle legislation in the following manner:

> [Courts] might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the same general will, of superior authority to judge-made rules on the same subject; and so reason from it by analogy in preference to them.[276]

In short, jurists were enjoined to exercise self-restraint and to defer to the legislature.[277]

These considerations underlie contemporary judicial treatment of statutes, as manifested in courts' increased willingness to read expansively the Married Women's Acts in numerous contexts, even effectuating the legislative will expressed therein, although not stated clearly.[278] Judges became less antagonistic and literal and

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[272] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57 (1905); Pound, *supra* note 214. *Accord* G. WHITE, *supra* note 162, at 155.

[273] G. WHITE, *supra* note 124, at 118. *Accord* Bingham, *supra* note 269, at 119-21.

[274] *See* Pound, *supra* note 268 (positive government action); G. White, *supra* note 124, at 71, 118 (all ideas in text).

[275] For the clearest contemporaneous statement of these ideas, see Pound, *supra* note 214, at 385-86. *Accord* HURST III, *supra* note 164, at 41-45; G. WHITE, *supra* note 162, at 155-56.

[276] Pound, *supra* note 214, at 385.

[277] *See* G. WHITE, *supra* note 162, at 155; Pound, *supra* note 214, at 385-86.

[278] *See* Landis, *supra* note 214, at 16-17; HURST III, *supra* note 164, at 41-45; HURST I, *supra* note 133, at 186-88.

more flexible and pragmatic.[279] They accorded greater weight to the legislative process, particularly as a policymaking endeavor, while evincing appreciation for the realities of drafting. They recognized that statutes generally resulted from an ongoing process.[280] Courts also read generously the text of Married Women's statutes, finding imprecise phraseology sufficient to cover specific, uncontemplated contingencies like interspousal tort litigation. When judges concluded that the text alone was insufficient, they attempted to ascertain legislative intent. Courts typically employed methods and considered information related to the Acts or the legislative process, such as legislative history.[281] Correspondingly, courts abandoned reliance on the canons of statutory construction. Indeed, the only frequently invoked canon—that measures in derogation of the common law were to be interpreted liberally to implement their remedial purposes—often was based upon a statute.[282] Jurists also gleaned applicable expressions of public policy from legislative activity in a particular area or related fields; from the passage of a succession of enactments; or from statutes by treating them like common-law precedents.[283]

Several other factors may explain these changes in judicial decisionmaking. First, numerous jurists were less reluctant to intervene in the family, particularly when the legislature had somehow addressed the issue before the court.[284] This phenomenon was reflected in the legalization of widened spheres of interspousal interaction and in rising divorce rates. The opinions also may be attributable to changing perspectives on judges' roles broader than those discussed above.[285] For example, some jurists believed that law should be used affirmatively to aid disadvantaged members of society and that fair resolution of specific cases required an appreciation of the moral dimensions and the social realities underlying

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[279] *See* HURST III, *supra* note 164, at 42-45; HURST I, *supra* note 133, at 187.

[280] *See* HURST III, *supra* note 164, at 40-46.

[281] *See id.* at 42; HURST I, *supra* note 133, at 188, J. JOHNSON, *supra* note 77, at 75-82.

[282] *See* HURST I, *supra* note 133, at 188 (abstract canons abandoned); Fiedler v. Fiedler, 42 Okla. 124, 128, 140 P. 1022, 1024 (1914) (tort immunity's abolition premised on statute requiring liberal interpretation of remedial Act).

[283] *See* HURST III, *supra* note 164, at 44-45; *supra* note 213 and accompanying text (contemporaneous example of Holmes' precedential treatment of statute).

[284] *See supra* notes 247-53 and accompanying text for Acts in cases that legalized interspousal tort activity.

[285] *See supra* notes 265-83 and accompanying text.

them. Therefore, some courts might have permitted interspousal tort claims because they wanted to intervene on behalf of the weaker party, help the injured female by affording a civil remedy, or punish and deter the social evil of wife battering, regardless of whether the judges thought that the legislators actually had contemplated these precise consequences.[286] Thus, although a few jurists may have considered it appropriate for courts to intervene in the family when necessary, even those who did not might have appreciated that there would be little detrimental interference in a marriage already disrupted by intentionally inflicted harm.[287]

Other significant reasons why courts permitted interspousal tort actions pertain to contemporary societal visions of women, marriage, wives, and the family. The images had substantially changed since immunity first was recognized and even since *Thompson* was decided.[288] During the late nineteenth century a new middle class emerged. Between 1895 and 1915, many groups within the class experienced "formative growth toward self-consciousness."[289] Conse-

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[286] See, for example, the cases recognizing interspousal tort suits, discussed *supra* notes 259 & 261 and accompanying text. *Cf.* G. WHITE, *supra* note 124, at 69-71 (judges were admonished to help weaker members of society, appreciate social realities, and do justice in specific cases).

[287] The courts that abolished immunity in Crowell v. Crowell, 180 N.C. 516, 523, 105 S.E. 206, 210 (1920), and Fiedler v. Fiedler, 42 Okla. 124, 126, 140 P. 1022, 1024 (1914), evinced some willingness to permit state intervention in the family. See the other cases recognizing interspousal tort suit, discussed *supra* notes 255-57 and accompanying text (second proposition in text). This account offers plausible reasons for courts' abolition of tort immunity. If jurists in states where such actions were allowed had read expansively the Married Women's statutes and legalized interspousal relations in numerous other contexts, it made sense to handle immunity similarly. Indeed, the writers of several opinions asked why a wife who was able to sue her husband for a broken promise could not also sue him for a broken arm. Moreover, if certain judges believed that they were obligated to effectuate the legislative will or to resolve equitably disputes, the jurists may have discharged these duties by abrogating immunity. *See* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

[288] Thompson v. Thompson, 218 U.S. 611 (1910). *See supra* notes 190-204 and accompanying text.

[289] R. WIEBE, *supra* note 106, at 112. *Accord* W. CHAFE, *supra* note 65, at 15-42; W. CHAFE, THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC AND POLITICAL ROLES, 1920-1970, at 3-22 (1972); W. O'NEILL, EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA (1969). For other helpful data, see generally sources on suffrage, *e.g.* E. FLEXNER, *supra* note 96, and sources on the "Progressive Era," such as R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 131-212 (1960); H. MAY, THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR OWN TIME, 1912-1917 (1959); M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1976). It is also difficult to generalize about such complex matters. *Cf. supra* note 177 and accompanying text (discussion of

quently, women in significantly increased numbers had careers or were employed, attended college, and advocated social welfare issues, often as members of women's clubs or moral reform organizations.[290]

These phenomena continued and accelerated during much of the teens, a period that can aptly be characterized as one of considerable ferment and optimism, especially regarding the prospects of improving society. "Progressivism" reached its zenith. That movement contributed to passage of much reform legislation, notably meant to protect females and children as family members and in the workplace.[291] Moreover, World War I gave public prominence to women who left their homes and participated in the war effort.[292] Women were involved actively in numerous political movements, most importantly suffrage, and their endeavors culminated in adoption of the nineteenth amendment to the United States Constitution.[293]

At this time, both the absolute number of divorces and divorce rates rose sharply.[294] Most significant was the decisive shift in public opinion toward markedly greater acceptance of divorce, because it exemplified important changes in American cultural values.[295]

Thus, by approximately 1915, wives probably were seen as having some separate legal identity, if not as completely independent individuals. Marriage and the family were perceived less as patriar-

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earlier images).

[290] *See* C. CLINTON, *supra* note 65, at 166-67; A. KRADITOR, *supra* note 177, at 5-6; W. CHAFE, *supra* note 65, at 27-29, 54-56. *Cf.* Minow, *supra* note 9, at 881 (women's voluntary work led to law reform mentioned *infra* note 291 and accompanying text); S. EISENSTEIN, *supra* note 177, at 13 (large increase in working women from 1890 to 1910).

[291] *See, e.g.*, S. WOOD, *supra* note 266, at 47-80 (child labor reform); Muller v. Oregon, 208 U.S. 412, 420-23 (1908) (challenge to workplace protective legislation for women); *infra* note 298 (workers' compensation legislation); L. GORDON, *supra* note 266.

[292] Professor Chafe found that "during World War I, thousands of women had moved into jobs formerly held by men, causing many observers to assert that a revolution in the economic role of women had occurred." W. CHAFE, *supra* note 289, at 22. He also found, however, that "only 5 per cent of the women war workers joined the labor force for the first time in the war years." *Id.* at 52. *Accord* B. BABCOCK, *supra* note 16, at 56-57. *Cf.* A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 217-49 (1982) (data on women workers); W. O'NEILL, *supra* note 289, at 169-224 ("women's movement and the war").

[293] *See generally* E. FLEXNER, *supra* note 96, at 256-337; *cf.* W. O'NEILL, *supra* note 289, at 146-224 ("feminism in the progressive era").

[294] W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 19-21 (1967).

[295] *Id.* at ix-x, 254-73.

chal enclaves insulated from public scrutiny.[296] These images were explicitly articulated in some immunity cases, and they may have been shared by judges.[297] When judges looked around at contemporary society, it could have seemed to them that legislators, who already had provided married women various indicia of legal status, intended to afford battered wives some relief.[298] Some judges may have thought it eminently sensible that a woman—forced to divorce the man who had infected her with venereal disease or impaired her own earning capacity, desecrating the sacred institution of marriage and treating her in the least "altruistic" way imaginable—should be able to seek compensation from and hold accountable that man in court. The judges may have intended to deter others similarly disposed, all to the benefit of the victim and society.[299]

The factors considered above were more significant to courts than tort law, although tort principles had become more important

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[296] *Id.* at 268-69 (Progressives believed new, more egalitarian family was evolving); *cf.* Olsen, *supra* note 65, at 1509-13, 1516-20, 1530-38 (improved women's legal status). *See generally* Minow, *supra* note 9, at 827-32 (describing and criticizing traditional view that wives became rights holders).

[297] See, for example, the cases discussed *supra* notes 255-57 & 263 (regarding family harmony and women as rights holders).

[298] *See* Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 746 (1935) (discussion of Married Women's Acts); Olsen, *supra* note 65, at 1509-13, 1516-20, 1530-38 (improved women's legal status).

[299] The facts are drawn from Crowell v. Crowell, 180 N.C. 516, 516, 105 S.E. 206, 206 (1920). Such facts, and the policies invoked, are similar to those in most cases abolishing immunity. *See supra* notes 252-63 and accompanying text. Caution is warranted, however, in concluding that the judiciary viewed women as persons in their own right entitled to all the rights men possessed. Some courts that abolished immunity did mention such rights, *see supra* note 263. Additionally, the Supreme Court observed that "great—not to say revolutionary—changes" in the "contractual, political and civil status of women, culminating in the Nineteenth Amendment," had brought gender differences almost to the "vanishing point." Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (holding Minimum Wage Act of 1918 an unnecessary unconstitutional interference with liberty of contract). The composition of the state judiciary is said to have changed, being comprised of fewer judges wedded to the common law or "educated in the legal supremacy of the husband." K. LLEWELLYN, *supra* note 129, at 40-41. But a commanding image of woman as rights-holder did not emerge. Moreover, the Supreme Court cases yield a mixed picture. Compare the language above from *Adkins* with Holmes' dissent in that case, 261 U.S. at 567-71, *supra* text accompanying note 214, and the patriarchal pronouncements in MacKenzie v. Hare, 239 U.S. 299, 311 (1915), mentioned *supra* note 227, and in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-95 (1937). *Cf.* Crozier, *supra* note 298, at 746-49 (Acts weakened common law, creating hiatus before public policy's rise during which judiciary recognized women's rights but gender discrimination ultimately prevailed).

than in earlier periods. The authors of the opinions mentioned in a cursory manner or alluded to the major purposes of tort jurisprudence. Most found more important the nineteenth century concepts of punishment and deterrence than the twentieth century notion of compensation.[300] A helpful example of this was the incremental character of liability's expansion. Contemporary developments in the substantive field were checkered. The negligence concept retained preeminence, weakening only minimally. Although numerous courts permitted an intentional tort cause of action for mental distress against common carriers, many other judges rejected such claims.[301] While the privity of contract requirement was initially eliminated for products liability actions in both negligence and warranty at this time, the two courts doing so were among the first to adopt tort immunity and each retained it throughout the teens.[302] Moreover, the courts effectively maintained the remaining tort immunities nationwide; indeed, immunity between parents and children attained much broader acceptance.[303] Thus, while tort jurisprudence did not figure prominently in the cases, jurists' articulation of tort law precepts gave that substantive area more significance than before and anticipated future developments.[304]

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[300] See the cases discussed *supra* notes 259-61 and accompanying text.

[301] For helpful discussion of the cases, see W. PROSSER & W.P. KEETON, *supra* note 2, § 12.

[302] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 382, 111 N.E. 1050, 1050 (1916) (abolishing privity requirement as to negligence); Mazetti v. Armour & Co., 75 Wash. 622, 622, 135 P. 633, 633 (1913) (abolishing privity requirement as to warranty); *cf.* Roller v. Roller, 37 Wash. 242, 242, 79 P. 788, 788 (1905) (third state to recognize parent-child immunity), *overruled*, Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). For early cases adopting interspousal tort immunity, see Longendyke v. Longendyke, 44 Barb. 366, 366 (N.Y. 1863); Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972), and *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). During the teens, immunity was not challenged in either state.

Many states also passed worker's compensation statutes, though most of the measures were limited. New York adopted the first statute in 1910, and by 1921 nearly every state had done so. *See* W. PROSSER & W.P. KEETON, *supra* note 2, § 80. *Cf.* Larson, *The Nature and Origins of Workers Compensation*, 37 CORNELL L. Q. 206, 232-33 (1952) (legislation limited).

[303] *See* W. PROSSER & W.P. KEETON, *supra* note 2, §§ 131, 133 (governmental, charitable immunities); Hollister, *supra* note 11 (parent-child immunity).

[304] Another explanation for the decisions abrogating immunity can be drawn from similar, contemporary judicial treatment of gender-based discrimination. In that field, the Married Women's Acts had undermined the common law's strength, creating a legal hiatus before the rise of public policy, during which some courts recognized that females possessed certain constitutional rights or additional entitlements. The legal hiatus was said to have been the

Although seven courts recognized interspousal tort suits between 1914 and 1920, the same number rejected such claims.[305] Several of the courts considered themselves bound by earlier precedent.[306] But even courts in states that never had addressed immunity denied interspousal litigation by employing logic nearly identical to that used much earlier.[307]

Thus, the judges announced a common-law rule of immunity which could be changed only by legislation and that their responsibility was to declare and not to make law.[308] When the jurists considered the substantially amended Married Women's Acts, they first determined from a cursory reading that the statutes in terms did not abolish immunity.[309] The courts then ostensibly construed the enactments, principally by discerning legislative intent. Instead of examining pertinent legislative information, the judges relied on variations of the abstract derogation canon[310] and recited the now-standard litany of public policy reasons—conjugal discord, frivolous or trivial actions, provision of alternative relief, juridical equality—to explain why legislators could not have "intended" interspousal tort suits.[311] Courts embellished the longstanding policy rationales and invested them with more strident rhetoric. Admonitions, replete with Biblical annotations, regarding the sanctity of the home resonated from the pages of opinions. Courts warned of

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apogee in women's constitutional status, but gender discrimination weathered the "change from ancient to modern nomenclature, and under its new sponsor, public policy, fully regained its old strength" by 1935. *See* Crozier, *supra* note 298, at 746-49.

[305] The cases are listed *supra* note 245.

[306] *See, e.g.*, Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920); Butterfield v. Butterfield, 195 Mo. App. 37, 38, 187 S.W. 295, 295 (1916); Lillienkamp v. Rippetoe, 133 Tenn. 57, 59, 179 S.W. 628, 628 (1915).

[307] *See, e.g.*, Heyman v. Heyman, 19 Ga. App. 634, 639, 92 S.E. 25, 37 (1917); Rogers v. Rogers, 265 Mo. 200, 205-08, 177 S.W. 382, 383-84 (1915); Keister v. Keister, 123 Va. 157, 160-75, 96 S.E. 315, 316-21 (1918).

[308] *Heyman*, 19 Ga. App. at 636, 92 S.E. at 26; *Rogers*, 265 Mo. at 202, 177 S.W. at 383-84.

[309] *See, e.g.*, *Heyman*, 19 Ga. App. at 636, 92 S.E. at 26; *Rogers*, 265 Mo. at 202, 177 S.W. at 383-84. Courts also demanded exacting specificity, finding, for example, that the Acts only governed property, or were procedural, and did not create new substantive causes of action. *See, e.g.*, *Drake*, 145 Minn. at 388, 177 N.W. at 624; *Keister*, 123 Va. at 157, 96 S.E. at 316-19.

[310] *See, e.g.*, Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); *Keister*, 123 Va. at 157, 96 S.E. at 317. A variation was the assumption that legislatures acted with the common law in mind.

[311] *See, e.g.*, *Rogers*, 265 Mo. at 200, 177 S.W. at 384; Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); *Lillienkamp*, 133 Tenn. at 57, 179 S.W. at 628.

disturbing the marital relation on which the health, purity and morals of civilization depended; the dangers of public exposure of insignificant familial disputes; the need for forgiveness between husbands and wives; and the importance of self-sacrifice, not only for the two people involved, but also for the greater good of the society.[312] Accordingly, these courts concluded that interspousal tort claims had not been prescribed.

The changes in perspectives on judicial decisionmaking and in societal images of women, marriage, wives, and the family which had occurred by the teens were not universal. They varied in scope, as well as geographically and temporally, affecting most courts differently and some not at all.

Many judges saw their responsibilities much like nineteenth century jurists. They remained strongly influenced by the common law, viewing statutes as intrusions upon it and, thus, narrowly construed them. Judges who were more receptive to legislation, nevertheless, may have considered it improper to look beyond the express text or to accord statutes precedential value. In fact, Pound conceded that his prescription for judicial treatment of statutes would "doubtless appeal to the common law lawyer as absurd."[313] Moreover, many judges would have found alien the proposition that courts should intervene in the family, even to rectify social ills like wife battering. Continued widespread reliance on the unity fiction and application of the derogation canon illustrate these ideas.

The changes in societal images of women clearly were not universal. Visions as pervasive and powerful as those that prevailed before the teens certainly could not be displaced completely, and many people continued to hold these perspectives. For example,

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[312] *See, e.g., Drake*, 145 Minn. at 391, 177 N.W. at 625; Crowell v. Crowell, 180 N.C. 516, 525-29, 105 S.E. 206, 211-13 (1920) (Walker & Hoke, JJ., dissenting); *Lillienkamp*, 133 Tenn. at 64, 179 S.W. at 629; *Keister*, 123 Va. at 176-77, 96 S.E. at 321-22 (Burks, J., concurring); *cf. Crowell*, 180 N.C. at 522-24, 105 S.E. at 209-10; Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022, 1023-25 (1914) (rhetoric and Biblical allusions in cases abrogating immunity). Such admonitions ring hollow, however, because nearly all the suits were pursued by, or on behalf of, a woman battered, or killed, by her husband.

[313] Pound, *supra* note 214, at 385. Indeed, statutes had not yet been received fully into the law. An interesting chronology can be traced from Pound, *supra* note 214, and Holmes, *supra* note 213; to Landis, *supra* note 214, and Stone, *supra* note 164, in the 1930s; to Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473 (1962), and Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 18-21 (1966), in the 1960s; to G. CALIBRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982), and Williams, *supra* note 226, in the 1980s.

even at the height of the women's suffrage movement, most females were not involved actively, and many remained opposed to giving women the right to vote.[314]

The opinions retaining immunity, nonetheless, convey the sense that the teens were a transitional time marked by real changes. For instance, the mechanical reasoning and the stylized format of opinions probably signal a realization that legislatures had captured primary policymaking authority.[315] More significantly, the vigor with which the earlier societal images were championed and transformed into arguments of public policy for recognizing immunity indicates judicial cognizance of several factors. Courts evidently believed that the older visions had continuing vitality worth defending against the threatening new images. They also seemed to appreciate that there had been changes in societal views of marriage and the family as manifested in greater public concern for their individual members[316] and that the Married Women's statutes actually had eroded the common law's strength and the merger fiction. These factors necessitated increased reliance upon policy considerations.[317]

In summary, from 1914 to 1920, courts in seven jurisdictions permitted interspousal tort litigation. These years cannot be characterized as a period of wholesale abandonment, however, because other jurists recognizing immunity afforded the rule continuing strength. Moreover, any change in such a longstanding and widely recognized doctrine which happened so abruptly was unlikely to continue at a comparable pace. Accordingly, it is not surprising that during the ensuing half century immunity eroded more

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[314] *See* C. DEGLER, *supra* note 65, at 328-61; *cf.* A. KRADITOR, *supra* note 177, at ch. 2 (compromises necessary to ensure suffrage secured); C. DEGLER, *supra* note 65, at 306 (nineteenth century women's movement left untouched great mass of women, many of whom scorned it as wrongheaded).

[315] Keister v. Keister, 123 Va. 157, 157, 96 S.E. 315, 315 (1918) is a classic of the formalistic genre. Indeed, the almost ossified exposition on rights and remedies might indicate a desire to freeze flagging judicial supremacy, or to recapture now-faded glory, or even to return to earlier, halcyon days.

[316] *See, e.g.*, cases discussed *supra* note 312 and accompanying text. Indeed, the strident rhetoric with which courts embellished the images and the strained manner in which courts deployed the images indicate how very threatening the newer images must have appeared.

[317] *See supra* note 293 and accompanying text. These considerations may give credence to the "deradicalization" idea, discussed *supra* notes 174-75 and accompanying text. Most interesting is the air of quiet desperation, or even decadence, that pervades certain tort immunity opinions.

gradually.[318]

(iv) 1921-1970. Between 1921 and 1970, tort immunity slowly eroded nationwide. Some states completely abolished the doctrine, allowing both intentional tort and negligence interspousal suits. Most jurisdictions, however, abrogated the rule in a piecemeal manner, recognizing actions in certain contexts, such as after divorce or one spouse's death. Over time, the percentage of opinions involving negligence immunity increased significantly. Most interesting, however, was the dearth of novel ideas in the cases, although those previously operating were articulated more explicitly or applied differently.[319] Thus, throughout the period courts cited accumulating precedent, relied substantially upon reasoning processes used earlier, and employed previously stated policy arguments to justify immunity's retention or abrogation. In the first quarter-century, the Married Women's Acts figured prominently in most determinations. During the second, however, the emphasis shifted to policy considerations principally related to torts. In short, by 1970, most states had permitted tort claims in some context, and the interspousal issue had become essentially a common-law policy question of substantive tort jurisprudence.[320]

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[318] Two interspousal tort immunity cases decided by the Kentucky Supreme Court in 1920 afford a valuable transition. In Dishon v. Dishon, 187 Ky. 497, 497, 219 S.W. 794, 794 (1920), *overruled*, Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953), the court's cryptic refusal to recognize a tort action aptly summarized prior similar treatment. Two months later in Robinson v. Robinson, 188 Ky. 49, 49, 220 S.W. 1074, 1074 (1920), the court permitted the administrator of the estate of a woman killed by her husband to sue the husband, thus presaging future developments. Before the *Robinson* case, the seven abolition cases, listed *supra* note 245, that involved intentional torts, had had the effect of fully abrogating immunity because courts in those states later held that negligence immunity also was abolished. *See, e.g.*, Bushnell v. Bushnell, 103 Conn. 583, 583, 131 A. 432, 432 (1925); Roberts v. Roberts, 185 N.C. 566, 566, 118 S.E. 9, 9 (1923). The Kentucky court was the first to partially abrogate immunity. It commenced a process which is ongoing, whereby judges or legislators who are unwilling to eliminate immunity fully, abolish it in specific contexts when abrogation is warranted. For instance, the *Robinson* court recognized that when the reasons for immunity have ceased to exist, as when murder ends the marriage, so should immunity. Partial abrogation has been a favored technique, and the piecemeal nature of abolition in Virginia is a classic, *see* Comment, *The Legislative Abrogation of Interspousal Immunity in Virginia*, 15 U. RICH. L. REV. 939 (1981). Similarly, Heyman v. Heyman, 19 Ga. App. 634, 634, 92 S.E. 25, 25 (1917), is a precursor because it is the first case seeking recognition of a negligence cause of action.

[319] The ideas were refined, applied in new contexts, or accorded varying significance at certain times, depending on their relative relevance.

[320] Judicial treatment of immunity by courts abolishing or retaining it was similar during the first two decades, changed somewhat between 1940 and 1950, and was nearly identical

From 1920 to 1940, considerably more jurisdictions recognized immunity than rejected it. In each decade, the same number of courts asked to allow interspousal tort claims for the first time rejected them as during the teens.[321] Most judges who recognized interspousal actions in the 1920s and 1930s served on courts that already had allowed intentional tort suits.[322] During the 1930s, however, courts that had retained immunity partially eliminated it, especially in the employer-employee context.[323]

Many jurists used reasoning similar to that employed before 1920. The Married Women's statutes remained integral, while judges relied substantially on precedent and the policy arguments developed earlier.[324] Courts rejecting litigation repeated the stock ideas supporting immunity, including the unity fiction, the existence of a common-law rule of tort immunity, the derogation ca-

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from 1950 until 1970. These similarities allow combined analysis of the initial and last score of years and individualized assessment of the middle decade, while the gradual pace of change and the paucity of novel concepts in the decisions facilitate examination of such a lengthy period. Space limitations preclude listing the cases. For specific periods, see Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3D 901 (1979) (and its predecessors).

[321] *See, e.g.*, Palmer v. Edwards, 155 So. 483 (La. App. 1934); Furstenberg v. Furstenberg, 152 Md. 247, 136 A. 534 (1927); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932), *overruled*, Miller v. Fallon County, 721 P.2d 342 (Mont. 1986); Sargeant v. Fedor, 3 N.J. Misc. 832, 130 A. 207 (1925); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N.E. 93 (1925) (the 1920s); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935) (the 1930s), *overruled*, Coffindaffer v. Coffindaffer, 161 W. Va. 557, 244 S.E.2d 338 (1978).

[322] *See, e.g.*, Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925) (superseded by statute as stated in Dzenutis v. Dzenutis, 200 Conn. 290, 512 A.2d 130 (1986)); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932). *Cf.* Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926); N.Y. GEN. OBLIG. § 3-313 (McKinney 1963) (states totally abolishing for the first time).

[323] *See, e.g.*, Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932) (injured plaintiff's subsequent marriage to servant or agent who negligently caused injuries held not to abate plaintiff's right of action against employer); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933) (where husband/servant's tortious act injuring his wife is act of his master, master is liable to wife, even though wife could not sue husband). *Cf.* Haglund, *supra* note 24, at 897-906 (analysis of employer-employee cases). This is a combined example of partial abrogation, the "Erosion Principle," and the significance of compensation and insurance.

[324] *See supra* notes 246-312 and accompanying text. Few judges incisively analyzed tort immunity or developed new ways of treating it, but there were exceptions. *See, e.g.*, Austin v. Austin, 136 Miss. 61, 73-74, 100 So. 591, 593 (1924) (Etheridge, J., dissenting); Courtney v. Courtney, 184 Okla. 395, 395, 87 P.2d 660, 660 (1938).

non, and traditional policy contentions such as marital harmony and frivolous claims.[325] Most important, however, were two "modern-day" policy notions which could have evolved from previously articulated concepts. First, the idea that a wife would raid her husband's estate may have foreshadowed the idea that unscrupulous spouses might collude to defraud motor vehicle insurers.[326] Second, the earlier treatment of the Married Women's measures presaged the notion of judicial deference to legislative public policy choices.[327] Moreover, the opinions rendered between 1920 and 1940 were less rigid, strained, and strident than cases decided from 1914 to 1920.[328] The most interesting aspects of decisions abrogating immunity were the increased judicial willingness to read the relevant Acts broadly and to abrogate immunity partially, particularly when the policy reasons for retention would not be contravened.[329]

During the 1940s, approximately twice as many courts retained the doctrine as repudiated it.[330] Courts continued to depend upon precedent and policy arguments, as the Married Women's legislation remained significant. Close scrutiny of the opinions indicates, however, that jurists handled immunity somewhat differently, indicating that the decade of the 1940s may have been a transitional

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[325] *See, e.g.*, Patenaude v. Patenaude, 195 Minn. 523, 523, 263 N.W. 546, 546 (1935), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969); *Austin*, 136 Miss. at 61, 100 So. at 591; Conley v. Conley, 92 Mont. 425, 425, 15 P.2d 922, 922 (1932).

[326] Perlman v. Brooklyn City Ry. Co., 117 Misc. 353, 354, 191 N.Y.S. 891, 891 (1921), *aff'd*, 202 App. Div. 822, 194 N.Y.S. 971 (1922), was the first case to mention the collusion idea, but many subsequent cases do. *See, e.g.*, Maine v. J. Maine & Sons, Co., 198 Iowa 1278, 1279, 201 N.W. 20, 21 (1924), *overruled*, Stuart v. Pilgrim, 247 Iowa 709, 720, 74 N.W.2d 212, 219 (1956); Lubowitz v. Taines, 293 Mass. 39, 41, 198 N.E. 320, 321 (1935).

[327] *See, e.g.*, Willott v. Willott, 333 Mo. 896, 899, 62 S.W. 2d 1084, 1085-86 (1933), *overruled*, Townsend v. Townsend, 708 S.W.2d 646 (Mo. 1986); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 184-85, 216 N.W. 297, 298-99 (1927), *overruled*, Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Oken v. Oken, 44 R.I. 291, 292-93, 117 A. 357, 358 (1922), *overruled*, Digby v. Digby, 120 R.I. 299, 388 A.2d 1 (1978).

[328] *Compare* the cases cited in *supra* notes 325-27 *with* those cited in *supra* note 307.

[329] *See, e.g.*, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926). For examples of partial abrogation, see Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935); Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377 (1934); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936), *overruled*, Hack v. Hack, 495 Pa. 300, 433 A.2d 859 (1981). For citations to the cases decided between 1920 and 1940, see Annotation, *supra* note 320.

[330] The number considering the question as a matter of first impression was quite small, so that judges in almost every jurisdiction had some precedent to consider.

period. The altered treatment was subtle, a matter of degree, and more pronounced in the decisions retaining immunity.[331]

These courts de-emphasized the unity fiction, the derogation canon, and the longstanding and less persuasive policy notions relating to alternative relief, "floodgates," and juridical equality. The judges stressed and continued to refine the fraud and collusion and judicial deference concepts. Although the marital harmony rationale retained prominence, the tenor of its articulation moderated.

Courts repudiating immunity relied less on the Married Women's Acts and more on the status of wives as individual rights-holders. In short, the 1940s witnessed alterations in the substance, emphasis, and tone of interspousal tort immunity opinions. Especially noteworthy is a shift in focus from the common law and statutes to the most convincing public policy considerations.[332]

Between 1950 and 1970, the pace of abrogation quickened, even though many more jurisdictions retained than abolished immunity. During the 1950s numerous courts partially eliminated the rule, but few completely abolished it. During the 1960s, only a small number of courts partially abrogated the doctrine and several totally eliminated it.

Judicial reasoning processes evolved but resembled those employed before. Precedent assumed greater significance with a growth in case law, and some jurists relied primarily on it.[333] Although courts mentioned the Married Women's statutes, their importance dwindled. Courts treated immunity almost entirely as a common-law policy question.[334] The mode of argumentation also changed, as jurists analyzed immunity more comprehensively, carefully, and candidly.[335] The tenor of most cases remained mild, but

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[331] McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943), is the most "Janus-like" opinion.

[332] For citations to the cases decided during this decade, see the sources cited in Annotation, *supra* note 320.

[333] Some opinions, especially those retaining immunity, were cryptic and included few reasons for the conclusion. *See, e.g.*, Sink v. Sink, 172 Kan. 217, 217, 239 P.2d 933, 933 (1952), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Romero v. Romero, 58 N.M. 201, 201, 269 P.2d 748, 748 (1954), *overruled*, Maestas v. Overton, 87 N.M. 213, 214, 531 P.2d 947, 948 (1975).

[334] But new policy ideas were not enunciated.

[335] They thoroughly ventilated the issues at stake and acknowledged the strengths and vulnerabilities of the policy arguments for and against abolition and retention. For example, the simultaneous ascendance of the fraud and judicial deference contentions on the one hand and the compensation rationale on the other may have reflected countervailing posi-

occasional strong language can be found in dissenting opinions.[336]

More specifically, nearly all courts rejecting tort suits abandoned the alternative remedies, frivolous litigation, and juridical equality ideas and relied principally on the marital harmony, collusion, and judicial deference notions. During the 1950s, jurists fully abrogating the doctrine primarily depended upon responses to these arguments. Courts partially eliminating immunity expressly observed that when the reasons for the rule, such as existence of a marital relationship, had ceased, so should the doctrine's application. By the next decade, however, some judges enunciated more explicitly affirmative policy arguments, like compensation for injuries.[337]

Courts handled the interspousal question as described above between 1920 and 1970 for numerous reasons, some of which are similar to explanations offered during earlier periods. Factors respecting judicial decisionmaking, tort jurisprudence, and societal images of females, wedlock, wives, and the family have more comparable importance than previously.

Considerations regarding judicial decisionmaking, particularly jurists' views of their roles, evolved during the fifty-year period, appearing to change somewhat in the 1940s. Statutes remained a primary source of legal growth[338] and, correspondingly, the strength of the common law, its rules and fictions continued to dwindle. Yet, opinions included more appeals to public policy, and courts increasingly treated substantive legal issues as policy questions appropriate for judicial resolution independent of legislatures.[339]

Two identifiable schools of legal thought refined ideas about judicial decisionmaking. The first jurisprudential movement, "Realism," predominated between 1920 and 1945. The second school,

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tions developed on a critical policy question.

[336] *See, e.g.*, Brennecke v. Kilpatrick, 336 S.W.2d 68, 74-76 (Mo. 1960) (Eager, J., dissenting); Meisel v. Little, 407 Pa. 546, 550-66, 180 A.2d 772, 774-82 (1962) (Musmanno, J., dissenting), *overruled*, Hack v. Hack, 495 Pa. 300, 433 A2d 859 (1962).

[337] For citations to the cases decided between 1950 and 1970, see the sources cited in Annotation, *supra* note 320.

[338] *See* HURST I, *supra* note 133, at 188-89.

[339] A classic statement of these ideas in the tort context is R. KEETON, VENTURING TO DO JUSTICE (1969). *See also* W. PROSSER & W.P. KEETON, *supra* note 2, § 3. Thus, while legislatures probably retained policymaking primacy, *see* text accompanying *supra* note 332, courts may have regained lost policymaking authority in torts, because legislatures lacked sufficient time to "seriously consider proposals for law reform," *see* R. KEETON, *supra*, at 16.

denominated "Reasoned Elaboration" or "Process Jurisprudence," was preeminent from 1945 until 1970.[340]

The Realists subscribed to concerns expressed earlier about disadvantaged persons and justice in specific cases. They advocated reliance on the use of nonlegal materials and criticism of mechanical concepts, legal reasoning, and opinion writing. The Realists also warned against placing undue reliance on traditional legal authority, including the common law, doctrine, and fictions, while favoring policy-oriented and functional decisionmaking and approaches that balanced interests, especially those of litigants.[341]

Realism posed a number of philosophical dilemmas, particularly irrationality and moral relativism. The Reasoned Elaborationists responded to such dilemmas by refining certain Realist theories and offering their own.[342] These judges and scholars emphasized rationality and consensus thinking. They were concerned about institutional relationships between the legislative and executive branches of government and the courts, for which they envisioned a circumscribed role. Thus, the judiciary was to exercise restraint, limit its lawmaking activity, and defer to the more democratic branches whenever practicable.[343] The Reasoned Elaborationists admonished courts to observe "neutral principles," respecting precedent. Courts were clearly, candidly, and comprehensively to articulate and balance the issues, interests, and values implicated, while resolving questions pursuant to societal consensus and refraining from judgment when these goals could not be attained.[344]

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[340] I rely most here on the work of those in the jurisprudential movements, such as Karl Llewellyn and Herbert Wechsler, and on White, *supra* note 268. *See also* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (secondary treatment).

[341] *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930); Llewellyn, *A Realistic Jurisprudence-The Next Step*, 30 COLUM. L. REV. 431 (1930). *Cf.* White, *supra* note 268, at 1013-26; White, *supra* note 340, at 280-82 (secondary treatment).

[342] *See, e.g.*, L. FULLER, THE LAW IN QUEST OF ITSELF (1940); *cf.* White, *supra* note 340, at 282-86 (secondary treatment); White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 655-56 (1984) (discussing how incremental criticism in this context precipitated legal change).

[343] *See, e.g.*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); *cf.* G. WHITE, *supra* note 162, at 323 (secondary treatment).

[344] *See, e.g.*, Hart, *supra* note 343; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *cf.* G. WHITE, *supra* note 162, at 323 (secondary

Once judges reached decisions, they were to write opinions in a lucid, forthright, and internally consistent manner and to justify conclusions with thorough, persuasive rationales.[345]

The ideas espoused by these jurisprudential schools may explain the courts' treatment of immunity. Judges' increasing willingness to abolish immunity partially manifested numerous Realist tenets. Jurists may have been attempting to provide equity between the parties, rejecting the irrelevant unity fiction, or recognizing the underlying social realities of wife battering.[346] Similarly, the judicial deference policy contention embodied aspects of Reasoned Elaborationist teachings.[347] Indeed, tort immunity, implicating delicate issues of marriage and the family about which there could be little societal consensus, might well have been the kind of question considered more appropriate for legislative resolution.[348] Moreover, significant changes in immunity's treatment after 1940, such as decreasing dependence on the common law, merger, and the Married Women's Acts, greater reliance on more salient public policy arguments, and use of more candid, thorough modes of argumentation reflected integral precepts of each jurisprudential school and of judicial decisionmaking in numerous substantive fields.[349]

Tort jurisprudence, particularly after 1945, appears to have been more important to immunity decisions than before 1920. It seems equally important as considerations regarding judicial decisionmaking.[350] Moreover, many aspects of courts' treatment of the interspousal question comported with a number of theoretical and case law developments in tort law.

The theorizing had numerous strands. Several major strains that developed between 1920 and 1950 can be identified. One group of

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treatment).

[345] *See, e.g.*, Bickel & Wellington, *supra* note 343; Sacks, *Foreword to the Supreme Court, 1953 Term*, 68 HARV. L. REV. 96 (1954); *cf.* G. WHITE, *supra* note 162, at 345 (secondary treatment).

[346] *See supra* note 341 and accompanying text.

[347] *See, e.g., supra* note 343 and accompanying text.

[348] *See supra* notes 343-44 and accompanying text.

[349] For example, the Reasoned Elaborationists evinced most concern about the United States Supreme Court's treatment of constitutional issues. *See supra* notes 341-45 and accompanying text (precepts of both schools).

[350] *See supra* notes 338-49 and accompanying text. Tort jurisprudence is related to contemporary judicial decisionmaking, for example, because tort law was one focus of the Realists. I rely most here on work of those, like Leon Green, who advocated tort law ideas discussed below, and for secondary treatment on G. WHITE, *supra* note 124.

judges and academicians treated torts as a "private law" subject with discrete boundaries, the primary purpose of which was admonitory. They emphasized the field's doctrinal nature and negligence as its organizing principle.[351] A second collection of judges and writers, the Realists, differed with much of this.[352] They considered torts to be an area of "public law," stressing its compensatory goal and de-emphasizing the field's doctrinal aspects and the central importance of negligence.[353]

"Tort law was not the same after the impact of Realism."[354] By the 1940s, however, tort law had become an "unwieldy, diverse, fluid subject," and Realism's philosophical difficulties had been exposed.[355] Thus, there ensued a search for consensus dominated by two approaches that grew out of the earlier thinking. The first, a "traditional" perspective, subscribed to the body of substantive tort doctrine and considered the field's principal purpose to be civil punishment of blameworthy behavior.[356] The other approach, characterized by a "policy" orientation, viewed torts primarily as a scheme for compensating injured people through insurance.[357] A surface reconciliation of these perspectives was said to have been achieved mainly through the efforts of Dean Prosser, who preserved doctrinal approaches to torts while applying Realist methodologies.[358] This theorizing contributed to subtle changes between 1945 and 1970, so that by 1970 torts was evolving into a public law

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[351] Professor White, *supra* note 124, at 78-83, describes Francis Bohlen as a central figure in this group. *Cf. id.* at ch.3 (full discussion of group's views and citations to writings).

[352] Professor White, *supra* note 124, at 75-78, describes Leon Green as a leader of this group. *Cf. id.* at ch. 3 (full discussion of group's views and citations to writings).

[353] *See id.* at 106-10, 149-50. Moreover, Professor White has identified a third group that included Charles Gregory and Fleming James, who also argued that negligence should have less significance. *Id.* at 146. The Realists also stressed the policy ramifications of tort law, urged courts to consider the relationship between parties before them while balancing the litigants' interests and policy factors, and recommended that strict liability be treated as a distinct category, rather than as a series of exceptions. *Id.* at 106-10, 149-50.

[354] *Id.* at 112.

[355] *See* G. WHITE, *supra* note 124, at 139-40 (unwieldy); *id.* at 139-41; text accompanying *supra* note 342 (exposure of Realism's philosophical difficulties, such as relativism).

[356] *See id.* at 140-53. Professor White identifies certain "Harvard-trained scholars," like the Keeton brothers, as leaders, *see id.* at 153. *Cf. id.* at 140-53 (full discussion of group's views and citations to writings).

[357] *See* G. WHITE, *supra* note 124, at 146-53. Professor White identifies Charles Gregory, Fleming James, and Leon Green as leaders of this group, *see id.* at 153. *Cf. id.* at 146-53 (discussion of group's views, the significance of insurance and citations to writings).

[358] For a thorough discussion of Dean Prosser's efforts, see *id.* at 153-79.

subject, principally aimed at adjusting societal risks through more equitable and efficient compensation of injuries.[359]

Although little of this thinking was acknowledged expressly in tort opinions until the 1940s, it may have influenced judicial decisionmaking during the entire half century. Numerous elements of the case law—including expansion of liability's ambit as well as developments respecting specific doctrine and perceptions of torts' purposes—were consistent with courts' handling of interspousal immunity. The patterns of gradual evolution throughout this period, as well as incremental change at the beginning and accelerating change near the end, extended across much of tort law.[360] For instance, the independent intentional tort cause of action for mental distress was adopted sporadically before mid-century, but more widely thereafter.[361] In products liability, courts slowly abrogated the privity requirement for negligence and warranty actions nationwide. Courts only recognized strict liability in tort during the 1960s, after which time it quickly swept the nation.[362] Numerous other tort doctrines slowly eroded over the fifty years, as judges developed "ameliorating practices and a group of exceptions for avoiding" the application of rules believed to "regularly produce unjust results or lag behind social and economic developments."[363] Indeed, the alteration of doctrines that occurred be-

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[359] *See id.* at 176-79. Professor White finds Prosser most influential, *see id.* at 176-77, but others, like James and Harper with their treatise, THE LAW OF TORTS (1956), and Charles Gregory were influential. Of course, all tort theorizing at this time did not fit neatly into the categories above, and tort scholars evinced little interest in tort immunity during the half century. There were Haglund, *supra* note 24, and Sanford, *supra* note 3, but the seminal work on tort law in the family realm was by a family law specialist, McCurdy, *supra* note 3.

[360] For helpful analysis of numerous doctrinal areas that evinced these patterns, see R. KEETON, *supra* note 339.

[361] *See* W. PROSSER & W.P. KEETON, *supra* note 2, § 3; Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

[362] For discussion of the slow development before the 1960s, see W. PROSSER & W.P. KEETON, *supra* note 2, §§ 96-97; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960). For judicial adoption of strict liability during that decade, see Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 57, 377 P.2d 897, 897, 27 Cal. Rptr. 697, 697 (1962). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402(A)(1965) (Restatement adoption); W. PROSSER & W.P. KEETON, *supra* note 2, § 98 (history of products liability).

[363] *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 594 (7th ed. 1982). Tort immunity, like these tort doctrines, was a prime candidate for the "erosion principle," which also explains judicial willingness to partially abrogate tort immunity. Other examples of the slow pace of change are Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.)

tween 1958 and 1968, led numerically by most of the tort immunities, was so dramatic that it has been characterized as a "decade of distinctly accelerated overruling."[364]

In addition to these patterns, courts after 1945 increasingly resolved numerous tort law issues by balancing certain important policy arguments, especially judicial deference and compensation.[365] This treatment reflected shifts in the perception of torts from a private to a public law field, compensatory in nature, and that warranted policy-oriented, rather than doctrinal, analysis.[366]

Finally, many developments in torts specifically relating to immunity can be traced to expanding automobile use and to developing notions of how to handle injuries attributable to negligent driving. For example, motor vehicle operation may underlie the spate of recognition of tort immunity, passage of guest statutes by half the states, and emergence of the fraud policy contention between 1920 and 1940, as well as the continuing significance of that argument and the judicial deference and compensation contentions thereafter.[367]

Factors relating to societal images that predominated from 1920 to 1970 comport in a number of ways with courts' treatment of the interspousal question. Because societal visions as ubiquitous and strongly held as those that existed before 1910 could not have been replaced totally and because the images that arose in the teens had such different and threatening ramifications, the newer images

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(first case recognizing wife's suit for consortium), *cert. denied*, 340 U.S. 852 (1950); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (lead case recognizing independent mental distress cause of action); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (first case abolishing traditional categories governing premises liability).

[364] *See* R. KEETON, *supra* note 339, at 3; *cf. id.* at 45 (immunities led development). Nonetheless, before 1960, all the tort immunities eroded slowly. *See* W. PROSSER & W.P. KEETON, *supra* note 2, §§ 122, 131, 133 (parent-child, governmental, and charitable immunity); Hollister, *supra* note 11 (parent-child immunity).

[365] The rise of the judicial deference and compensation ideas extended across much of tort law. *See* W. PROSSER & W.P. KEETON, *supra* note 2, §§ 3-4; *cf.* Keeton, *supra* note 313 (history of deference's rise); G. WHITE, *supra* note 124, at 146-53 (history of compensation's rise).

[366] *See infra* notes 389-91 & 394-95 and accompanying text.

[367] *See* W. PROSSER & W.P. KEETON, *supra* note 2, § 34 (discussion of guest statutes). *Cf. id.*, §§ 34, 122; Hollister, *supra* note 11 (preeminence of judicial deference and compensation ideas and juxtaposition of latter with fraud counter-argument evident in cases challenging guest statutes and parent-child immunity). *See generally* L. FRIEDMAN, *supra* note 37, at 588-89 (after 1920 tort law increasingly became "law of the automobile").

could not have been expected to prevail. Indeed, what vitality the visions had eroded swiftly and dramatically. Consequently, those that predominated throughout most of this half-century were of the traditional nuclear family in which the husband was the principal wage earner and the wife functioned primarily as homemaker. The particulars of these images varied over time, yet the visions apparently were so strong that they masked and denied the statistical realities, such as escalating divorce rates.[368]

Public opinion substantially shifted between the world wars. World War I, with its aura of "holocaust and meaningless death and its mood of social instability" precipitated changes: prewar optimism and earnestness became cynicism; "social responsibility gave way to alienation, virtuousness appeared as hypocrisy."[369] Although the Progressive movement did not end during the 1920s, it wore a "changed face."[370] States still enacted social welfare measures, but many Americans opposed additional change.[371] Moreover, some advances made in the Progressive era, especially for females, were lost or eroded, while the ephemeral quality of others was revealed. After the Armistice, numerous wives quit the work place and returned to their households, undermining whatever accomplishments women had achieved.[372] Despite the political gain that suffrage represented, much of the reform's promise failed to materialize, because the females who voted made choices remarkably similar to men.[373]

The reexamination of traditional mores triggered by the war and Progressivism may have been detrimental. Many "came to question the inviolability of their own moral principles," the number of divorces continued to soar, and the increased freedom captured in the "flapper" idea translated into little real political or economic

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[368] *See* W. CHAFE, *supra* note 289; N. BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (1962); W. O'NEILL, *supra* note 294, at 20-21 (divorce rates).

[369] White, *supra* note 268, at 1014. *Accord* M. COWLEY, EXILE'S RETURN (1934); W. O'NEILL, *supra* note 294, at 269-70.

[370] White, *supra* note 268, at 1013. *Accord* W. LEUCHTENBERG, THE PERILS OF PROSPERITY: 1914-1932 (1958); H. MAY, *supra* note 289.

[371] *See* White, *supra* note 268, at 1013 (states enacted social welfare measures); W. O'NEILL, *supra* note 9, at 90; S. WOOD, *supra* note 266, at 255-56 (opposition to certain reforms or more change).

[372] *See* W. CHAFE, *supra* note 289, at 52-54. *Accord* B. BABCOCK, *supra* note 16, at 57.

[373] *See* W. CHAFE, *supra* note 289, at 26-33; E. FLEXNER, *supra* note 96, at 331; W. O'NEILL, *supra* note 9, at 92.

liberty.[374] With the stock market crash and the Great Depression, the public mood became much more "hard-boiled";[375] women were excluded from certain occupations, and those who held jobs were castigated for depriving males of work.[376] Given these societal dislocations, it should not have been surprising that from the 1920s until the 1940s prominent public figures and organs of popular culture persistently reinforced the notion that a woman's proper place was in the home.[377] In short, by 1940 women's political, economic, and social status had improved minimally, while the vision of female as homemaker was strengthened.[378]

The Second World War, however, required creation of new images for women, even as it altered underlying social realities. To recruit females for the war effort, women workers were portrayed publicly as fully competent to perform tasks formerly reserved exclusively for males.[379] Millions of married and single women entered the job market, and they were paid higher wages and labored under better conditions than before the war.[380] Most salient, however, substantial numbers of females remained permanent members of the work force after the war. These realities undermined the hegemony of the prevailing visions of women as homemakers and of husbands as primary breadwinners and heads of their households.[381]

Nevertheless, the images continued to have considerable vitality throughout the 1950s because of post-war societal uncertainties. Dislocations caused by World War II, tensions created by the Cold War, and McCarthyism contributed to a search for consensus in American life, pressures to conform, and the desire to reestablish

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[374] White, *supra* note 268, at 1013-14. For additional discussion, see W. CHAFE, *supra* note 289, at 51, 94-96; H. MAY, *supra* note 289.

[375] D. WECTER, THE AGE OF THE GREAT DEPRESSION 251 (1948). *Accord* W. O'NEILL, *supra* note 294, at 269-70.

[376] *See* W. CHAFE, *supra* note 289, at 64, 107-09. *Accord* B. BABCOCK, *supra* note 16, at 57.

[377] *See* W. CHAFE, *supra* note 289, at 64, 107; W. CHAFE, *supra* note 65, at 31-34.

[378] *See* W. CHAFE, *supra* note 289, at ch. 4; W. CHAFE, *supra* note 65, at 29-34.

[379] *See* W. CHAFE, *supra* note 289, at ch. 6; W. CHAFE, *supra* note 65, at 92-94.

[380] *See* W. CHAFE, *supra* note 289, at ch. 6; W. CHAFE, *supra* note 65, at 92-95. *Cf.* Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 9 (1975) (equal pay requirement in force during war, quietly retired later). *See generally* Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1176 (1986) (veterans' job protection statute).

[381] *See* W. CHAFE, *supra* note 289, at ch. 8, 144-46; W. CHAFE, *supra* note 65, at 94-96.

the patterns of a "simpler era."[382] Many females experienced conflicts about their appropriate roles and were advised by public leaders, the media, and health professionals to seek fulfillment in the successful performance of their natural responsibilities as wives and mothers.[383] The authority of the predominant images of the nuclear family was not challenged seriously until the 1960s. That decade witnessed the rejuvenation of the organized women's movement, which had been comparatively quiet, especially in the political arena, since adoption of the nineteenth amendment.[384]

These prevailing visions were enunciated expressly in the immunity opinions and were shared by judges. Indeed, many would have been reluctant to take any action that might jeopardize the family's well being. Thus, these jurists would have been unwilling to permit tort suit by a female, separated, but not divorced, from her battering spouse. They would have allowed the children of a woman murdered by her husband to sue, however. Moreover, the strength exerted by the predominant images at different times during the half-century paralleled the slow pace of the doctrine's erosion and the preeminence of the marital harmony policy argument throughout the period. It also was consistent with the flurry of cases recognizing immunity from 1920 to 1940 and the accelerated

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[382] W. CHAFE, *supra* note 289, at 208-09; G. WHITE, *supra* note 124, at 140, 144-45.

[383] *See* W. CHAFE, *supra* note 289, at 205-09 (writers urged women to return to the home, while educators advocated that child rearing and homemaking be raised to the dignity of a profession and made the primary purpose of women's colleges); W. CHAFE, *supra* note 65, at 94-95 (magazines featured pictures of large families, praised women who became professionals at homemaking, and glorified family togetherness).

[384] B. BABCOCK, *supra* note 16, at 56-58; W. CHAFE, *supra* note 289, at 227. The period of comparative quiet in the women's movement mirrors the hiatus in the demise of interspousal tort immunity. Whether there is any link between the two phenomena will require more research. For helpful discussion of the "lag theory," especially how the family lags behind the market, see Olsen, *supra* note 65, at 1513-20.

During the 50 years, there probably was considerable uncertainty about how to reconcile the societal visions that obtained in the nineteenth century with those of the teens. Thus, the views prevailing from 1920 until 1970 may have been an accommodation of the images of the two earlier periods, so that wives could have been seen anywhere on a spectrum that ranged from chattels to full rights holders. *See, e.g.*, the dissenting and majority opinions in Austin v. Austin, 136 Miss. 61, 80, 72, 100 So. 591, 595, 593 (1924): "When the Constitution and Legislature emancipated women from the disability of coverture, they necessarily made her a legal person [with] the right under the law to a redress for a personal injury. . . . Secrecy will cure many troubles of the home, while publicity will only add fuel to the flames." *Accord* McKinney v. McKinney, 59 Wyo. 204, 204, 135 P.2d 940, 940 (1943).

rate of change in the 1960s.[385]

Thus, between 1920 and 1970, immunity eroded gradually nationwide and within particular jurisdictions. By 1970, the interspousal issue was treated almost exclusively as a policy question. Most states had allowed tort litigation in some context and the pace of abolition was accelerating. Predictably, then, after 1970 the doctrine increasingly came under attack and was transformed quickly from a majority to a minority rule.

(v) 1970-1989. During the last two decades, interspousal immunity has been severely weakened.[386] Many courts have either completely or partially abolished the doctrine, and legislatures in several jurisdictions have provided for intentional tort actions between spouses. Most cases involved negligence, the newest manifestation of which was unreasonable household behavior.[387] In short, approximately one-sixth of the states retain immunity in some form, and a substantial majority have fully abolished it.[388]

Judges no longer relied on the Married Women's statutes but restated, comprehensively and candidly, refined policy arguments. For instance, jurists more carefully separated and juxtaposed contentions applicable to intentional, as opposed to negligent, torts.[389] Judges who permitted claims emphasized tort law's compensatory goal and explicitly acknowledged wives' individual rights. Jurists retaining immunity stressed the marital tranquility, fraud, and judicial deference concepts. Considerations respecting judicial decisionmaking, torts, and societal images—most of which evolved from prior developments—appeared more interrelated and quite significant to resolution of the interspousal question.[390] The thorough and rapid abandonment of the longstanding doctrine will be examined initially.

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[385] Although a decade-by-decade analysis might yield more refined conclusions, I only discovered numerous, obvious ideas that were apparent from assessing the longer period or that operated in earlier periods, such as the Acts' amended nature.

[386] For helpful lists of the cases, see Burns v. Burns, 518 So. 2d 1205, 1211-12 (Miss. 1988); Heino v. Harper, 306 Or. 347, 349-50, 759 P.2d 253, 254-55 (1988).

[387] *See, e.g.*, Brown v. Brown, 381 Mass. 231, 231, 409 N.E.2d 717, 717 (1980); Merenoff v. Merenoff, 76 N.J. 535, 535, 388 A.2d 951, 951 (1978).

[388] *See supra* note 2.

[389] *See, e.g.*, S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986); Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

[390] The quintessential example of the ideas in the text are the developments described *infra* note 395 and accompanying text.

Trends in judicial decisionmaking, especially jurists' perspectives on their roles and relationships to other societal institutions, changed substantially.[391] The United States Supreme Court, numerous lower federal courts, and some state courts increasingly considered it an important judicial responsibility to resolve significant social issues. These new duties included resolution of issues formerly deemed less appropriate for treatment by courts than by other government branches or societal entities like the family or religious organizations.[392] Courts were especially receptive when rights of disadvantaged minorities and women were implicated and when the legislative and executive branches and other societal institutions had been relatively unresponsive.[393] Correspondingly, certain state judges apparently believed that they were obligated to address important familial disputes, even those previously thought better left to legislatures or extra-legal entities, particularly when individual family members' rights were involved.[394] Moreover, courts addressing tort questions assumed greater responsibility for substantive change in the field. They resolved issues formerly considered more appropriate for treatment by legislatures or other societal institutions; opened new and expanded old areas of liability; increasingly overruled precedents; and empha-

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[391] But these trends did evolve from prior developments, *see supra* notes 338-67 and accompanying text. I rely most here on G. WHITE, *supra* note 162, at 295-316, 320-24; White, *supra* note 268, at 1027-28; White, *supra* note 340, at 290-302 for secondary treatment and case law for primary treatment.

[392] *See* G. WHITE, *supra* note 162, at 320-26, 339-41, 357-59; White, *supra* note 340, at 290-91, 295-96. *Cf.* A. COX, THE WARREN COURT (1968); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (contemporaneous advocacy of views); G. WHITE, EARL WARREN, A PUBLIC LIFE (1982) (analysis of jurisprudence of important advocate of views).

[393] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (women's rights); Baker v. Carr, 369 U.S. 186 (1962) (voting rights); Brown v. Board of Educ., 347 U.S. 483 (1954) (blacks' rights); *Cf.* G. WHITE, *supra* note 162, at 320-26, 39-41, 57-59; G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 60-61 (1978) (secondary treatment).

[394] Judges intervened in, legalized, and made public the family in fields such as domestic relations law. *See* R. MNOOKIN, IN THE INTEREST OF CHILDREN (1985); Minow, *supra* note 9, at 832-33. This also was true of parent-child immunity, *see* Hollister, *supra* note 11. *Cf.* Olsen, *supra* note 65, at 1530-39 (full discussion of developments); Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 HARV. WOMEN'S L.J. 167 (1979); *infra* note 413 and accompanying text (statutory protections for wives); *infra* note 403 (all tort immunities' erosion evinces courts' willingness to intervene in institutions earlier considered sacrosanct); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L. REV. 589, 644 (1986) (judicial protection for battered women).

sized the judiciary's special obligation to "modernize" the common law.[395]

Rapidly expanding and broadly liberalized liability emerged as the dominant themes in tort jurisprudence. Aimed primarily at achieving the field's compensatory purpose and premised substantially on the availability of insurance, these themes comported with the dramatic overthrow of tort immunity.[396] More areas were governed by strict liability principles. Strict liability in tort for injuries caused by defective products swept the country,[397] and many jurisdictions adopted no-fault automobile compensation schemes.[398] Some authorities have even suggested that courts' abolition of the familial immunities constituted a judicially imposed no-fault system.[399] Moreover, many jurisdictions relaxed doctrinal categorizations that had served to limit imposition of tort liability. Numerous states implemented comparative negligence,[400] and they modified guest statutes,[401] status categories governing premises lia-

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[395] All of these ideas are discussed in the next paragraph. *Cf.* Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986); Miller v. Fallon County, 721 P.2d 342, 344-45 (Mont. 1986) (recent tort immunity cases emphasizing obligation to modernize common law).

[396] The developments described here evolved from prior ones, *see supra* notes 359-67 and accompanying text; *infra* note 406. I rely most on the cases. For helpful secondary treatment, see W. PROSSER & P. KEETON, *supra* note 4; M. SHAPO, TOWARDS A JURISPRUDENCE OF INJURY (1984); G. WHITE, *supra* note 124, at 168-243; Priest, *The Current Insurance Crisis and Modern Tort Law*, 9 YALE L.J. 1521, 1525 (1987). For helpful discussion of ideas underlying the dominant theme in the text by those who influenced the developments that ensued, see R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). *Cf.* W. PROSSER & W.P. KEETON, *supra* note 2, §§ 82-85 (discussion of compensation systems).

[397] For a helpful discussion of ideas underlying this development by one who influenced it, see Prosser, *supra* note 362. *Cf.* W. PROSSER & W.P. KEETON, *supra* note 2, §§ 95-104A; RESTATEMENT (SECOND) OF TORTS § 402A (1965) (full analysis of strict tort liability).

[398] For a helpful discussion of ideas underlying this development by those who influenced it, see R. KEETON & J. O'CONNELL, *supra* note 396; *Cf.* W. PROSSER & W.P. KEETON, *supra* note 2, § 84; A. WIDISS, NO-FAULT AUTOMOBILE INSURANCE IN ACTION (1977) (later developments).

[399] *See infra* note 472 and accompanying text.

[400] *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 804, 532 P.2d 1226, 1226, 119 Cal. Rptr. 858, 858 (1975) (lead case); Wade, *Comparative Negligence*, 40 LA. L. REV. 299 (1980) (chronicling development). For helpful discussion of ideas underlying this development, which was primarily statutory, and of the concept, see P. KEETON, *supra* note 4, § 67; V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986).

[401] *See* Brown v. Merlo, 8 Cal. 3d 855, 855, 506 P.2d 212, 212, 106 Cal. Rptr. 388, 388, (1973) (lead case); W.P. KEETON, *supra* note 4, § 34, at 215-17 (chronicling development and discussing guest statutes).

bility,[402] and parent-child, sovereign, and charitable immunities.[403] Novel causes of action such as wrongful birth were recognized.[404] Legislators, who evinced greater willingness to pass substantive tort measures,[405] and judges, who were more ready to act in areas of legislative inactivity,[406] shared responsibility for the expanding ambit of liability.

Societal visions of women, marriage, wives, and the family also have been quite important, changing significantly during the past two decades. This time has been one of considerable social ferment, characterized by disintegrating consensus.[407] More women than ever before work, many in jobs formerly held almost exclusively by men.[408] Divorce rates have continued to rise, and nearly

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[402] *See* Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (1968) (lead case); J. PAGE, PREMISES LIABILITY (1984); W. PROSSER & W.P. KEETON, *supra* note 2, §§ 58-62 (chronicling development and discussing premises liability).

[403] *See* Hollister, *supra* note 11 (parent-child); W. PROSSER & W.P. KEETON, *supra* note 2, § 122, at 904-07; 131; 133 (parent-child, sovereign and charitable immunities). California continued to lead these developments. *See supra* note 364 (earlier leadership). New Jersey, however, may now have assumed the mantle.

[404] *See* W. PROSSER & W.P. KEETON, *supra* note 2, § 55, at 370-73 (chronicling development and discussing concept). *Cf.* W. PROSSER, J. WADE, & V. SCHWARTZ, *supra* note 363, at 463-68 (discussing recognition of other new causes of action); Finley, *Rescuing a Submerged Text: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM (forthcoming 1989).

[405] For example, no-fault compensation, *see supra* note 398, was instituted almost exclusively by legislatures, and comparative negligence, *see supra* note 400, was primarily a legislative innovation.

[406] The increasing "activism" and decreasing deference in the latter half of the 1960s, mentioned *supra* notes 359-67 and accompanying text, have since become more pronounced. *See* W. PROSSER & W.P. KEETON, *supra* note 2, § 3; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976). Indeed, the latest manifestation of the interplay between the judicial and legislative branches, albeit one generally aimed at limiting liability, is passage of "tort reform legislation," such as that imposing "caps" on damages in certain situations. See Priest, *supra* note 396, at 1587-88; Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277 (1987); *Symposium: Issues in Tort Reform*, 48 OHIO ST. L.J. 317 (1987); *Tort Reform Symposium Issue*, 64 DEN. U.L. REV. 613 (1988).

[407] J. MITCHELL, WOMAN'S ESTATE 11-42 (1971); W. O'NEILL, COMING APART (1971); P. SLATER, THE PURSUIT OF LONELINESS (1970).

[408] W. CHAFE, *supra* note 65, at 119-20; Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 922 (1983); Ginsburg, *supra* note 380, at 8-9. *Cf.* Freedman, *supra* at 921 (feminist goal to gain access for women to opportunities previously reserved for men and equal rewards once access achieved). *But cf.* W. CHAFE, *supra* note 289, at 247; Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1273 n.114 (1986) (discrimination in compensation).

all states permit no-fault divorce.[409] Women have participated energetically in the major political movements—protesting American involvement in Vietnam, opposing racism, pursuing environmental and consumer protection, and seeking greater rights for themselves.[410] The women's movement, relatively inactive since gaining suffrage, has been revitalized and vigorous, pressing for widespread reform.[411] Further, a number of new economic, political, and civil rights, and legal causes of action, have been recognized and numerous existing ones expanded.[412] For these reasons, images of women, as well as the family, husbands, and wives, have changed.

Many people have begun to view the family and marriage as comprised of individuals whose personal fulfillment is as important as the continued existence of either unit. Married women have come to be seen as individuals entitled to the same rights and opportunities possessed by others and for whom the government ought to intervene in the family when necessary. For example, some states have granted statutory protections to battered wives and victims of spousal rape.[413] Courts articulated these modern views of women and wives in judicial opinions. Indeed, in contemporary society, it probably seemed appropriate as a matter of pub-

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[409] *See* L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA, at xvii, 215 (1985) (divorce rates); *id.* at 41-49 (no-fault divorce).

[410] *See* M. CARDEN, THE NEW FEMINIST MOVEMENT (1974); A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977); J. HOLE & E. LEVINE, REBIRTH OF FEMINISM (1971); J. MITCHELL, *supra* note 407. *Cf.* Freedman, *supra* note 408, at 916-17 (catalog of rights women achieved).

[411] *See* J. HOLE & E. LEVINE, *supra* note 410; J. MITCHELL, *supra* note 407, at 11-96. *Cf.* M. CARDEN, *supra* note 410, at 9-15 (discussion of major ideas of movement); Freedman, *supra* note 408, at 915; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 389 n.7 (1984); Taub & Schneider, *supra* note 94, at 130 (describing women's movement's development of rights legal theory and warning of dangers inherent in approach).

[412] *See, e.g., supra* notes 393 & 410. Of course many of these rights were recognized at the behest of individual women or the women's movement. *See supra* note 411.

[413] *See infra* notes 590-95 and accompanying text (women as individual rights holders); Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657 (1981); Olsen, *supra* note 65, at 1530-39 (intervention in family); *id.* at 1518; E. PLECK, *supra* note 40, at 182-200 (battered women's protections); Note, *supra* note 394 (battered wives' protections); Note, *supra* note 408 (protections governing spousal rape). *Cf.* Olsen, *supra* note 65, at 1530-39 (other protections). Indeed, recent statutes prescribing interspousal intentional tort suits were included in legislative packages aimed at wife battering and spouse abuse. *See, e.g.*, ILL. REV. STAT., ch. 40 para. 1001 (1982), *cited in* Moran v. Beyer, 734 F.2d 1245, 1246 n.3 (7th Cir. 1984); MONT. CODE ANN. § 40-2-109 (1984).

lic policy (1) to intervene in marriages on behalf of abused women, recognizing their individual rights, and (2) to permit wives whose husbands negligently hurt them to seek compensation, affording personal injury causes of action.[414]

Of course, a number of judges did not view their roles, torts, or society as described above. These jurists did not see themselves as "activist policymakers" but instead believed that other governmental branches or societal institutions could treat more properly harmful interspousal conduct.[415] Even those who acknowledged the compensatory purpose of tort law might have found it overridden in the marital context by the potential for collusion between spouses or because this goal should be effectuated by legislatures.[416] Similarly, judges who recognized women's rights in many situations could have thought that such rights were superseded by society's interest in the integrity of the nuclear family.[417] One, or a

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[414] The newer images seem different from those prevailing during the preceding half century and more similar to visions extant in the teens. But the prevalence and longevity of the newer images are unclear, as illustrated generally by events in the 1980s, when many women have not improved their conditions or acquired more power, and specifically by recent opinions opposed to abolition.

A miscellany of less compelling reasons exists. For example, the current activity may evince only judicial willingness to clean up an area of the law long considered untidy, as evidenced by states that finally eliminated immunity after decades of piecemeal abolition. *See, e.g.*, the phenomenon in Maryland as traced in Boblitz v. Boblitz, 296 Md. 242, 250-52, 462 A.2d 506, 510-11 (1983). But this idea, and others, fail to account adequately for the dramatic doctrinal change.

[415] Recent examples are Burns v. Burns, 518 So. 2d 1205, 1213 (Miss. 1988) (Griffin, J., dissenting); S.A.V. v. K.G.V., 708 S.W.2d 651, 654-56 (Mo. 1986) (Welliver, J., dissenting in part).

[416] Recent examples are Shook v. Crabb, 281 N.W.2d 616, 621-22 (Iowa 1979) (LeGrand, J., dissenting) (collusion potential); Davis v. Davis, 657 S.W.2d 753, 759-60 (Tenn. 1983) (Humphreys, J., dissenting) (legislative effectuation); Burns v. Burns, 518 So. 2d 1205, 1213-16 (Miss. 1988) (Griffin, J., dissenting) (legislative effectuation); Tader v. Tader, 737 P.2d 1065, 1070 (Wyo. 1987) (Brown, C.J., dissenting) (encouragement of fraud and collusion and facilitation of "overly friendly lawsuits between husband and wife").

[417] Recent examples are Hill v. Hill, 415 So. 2d 20, 22-24 (Fla. 1982); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 155, 431 N.E.2d 998, 1000 (Locher, J., concurring), *cert. denied*, 457 U.S. 1135 (1982), *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985). With allusions to the need to protect the beleaguered family as the foundation of civilization, what appears at stake for these, and other, judges and many members of society resonates in the opinions. Notwithstanding the rhetoric or the conviction with which judges hold the views espoused, they seem to overestimate abolition's significance and to be looking backward through rose-colored glasses at an image of the family which may have never existed and does not today, given national statistics on wife battering and divorce rates. *See* Marcus, *supra* note 413, at 1662 n.19 (2,000,000 wives battered annually by husbands); L.

combination, of these considerations plausibly explains the continuing prominence of the marital harmony, fraud, and judicial deference policy arguments, as well as the continuing, though dwindling, vitality of immunity.[418]

Thus, interspousal tort immunity has a long, rich, and interesting history. Although courts initially asked to permit personal injury suits between husbands and wives focused almost entirely on the Married Women's enactments, those statutes rarely are mentioned today. Instead, immunity has become essentially a debate over the public policy reasons for continued application and abolition. Moreover, although courts and writers have enunciated numerous policy arguments over time, those contentions are now static. The public policies favoring retention and abrogation will be examined in the next Part of this Article.

II. Public Policy Reasons for Retention and Abolition of Immunity

A. Reasons for Retention of Immunity and Responses to Those Reasons

Courts and commentators articulate five recurring public policy arguments in favor of interspousal tort immunity. First, many state that immunity preserves marital harmony and that interspousal tort litigation disrupts such tranquility. The oldest and most frequently invoked rationale, this notion remains quite persuasive. The second important reason for the doctrine's current vitality is the fear that husbands and wives would engage in fraud and collusion. The third idea, that courts should defer to legislatures in resolving the immunity question, also has considerable strength today. A fourth rationale is the threat of excessive and frivolous claims, and the fifth justification is that injured spouses should pursue alternative remedies. These last two arguments frequently appeared in the early cases, but rarely are mentioned anymore.

1. Marital Harmony. The policy which was enunciated first, has been articulated most consistently, and continues to have much vi-

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Weitzman, *supra* note 409, at xvii, 215 (similar divorce rates).

[418] Tort immunity recently has been retained in some form by numerous states. *See supra* note 2.

tality is that immunity protects connubial peace while permitting suit would create, or exacerbate preexisting, disharmony. The formulations of the concept vary. A classic version appears in an early Pennsylvania opinion: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders."[419] Later decisions proclaimed that interspousal actions would contradict the clear state policy of preserving inviolate marriage and the family.[420] The most recent variation of this theme is that such claims would impose one additional burden on those already beleaguered institutions.[421]

Unfortunately, very few courts have justified satisfactorily their reliance upon the domestic harmony rationale. Judges writing early opinions simply assumed that there is a peculiar societal interest in protecting marital peace that transcends the needs of the two people involved.[422] Recently, several judges have observed that connubial and familial stability should be maintained because marriage and the family are fundamental structural components of American society.[423] Little additional justification for the argument is offered, however.[424]

Moreover, few courts explain precisely how immunity preserves conjugal tranquility or how permitting suit leads to, or aggravates prior, dissension. Several authors of early opinions apparently believed that immunity protects connubial harmony by shielding

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[419] Ritter v. Ritter, 31 Pa. 396, 398 (1858). I provide the obligatory reference to *Ritter*, but it was not a tort case.

[420] *See, e.g.*, Alfree v. Alfree, 410 A.2d 161, 162 (Del. 1979), *appeal dismissed*, 446 U.S. 931 (1980); Patenaude v. Patenaude, 195 Minn. 523, 525-26, 263 N.W. 546, 547-48 (1935), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969); Counts v. Counts, 221 Va. 151, 155-56, 266 S.E.2d 895, 897-98 (1980).

[421] *See, e.g.*, Shook v. Crabb, 281 N.W.2d 616, 621 (Iowa 1979) (Le Grand, J., dissenting); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 155, 431 N.E.2d 998, 1000, (Locher, J., concurring), *cert. denied*, 457 U.S. 1135 (1982); Davis v. Davis, 657 S.W.2d 753, 759-60 (Tenn. 1983) (Humphreys, J., dissenting).

[422] *See, e.g.*, Ritter v. Ritter, 31 Pa. 396, 398 (1858); Lillienkamp v. Rippetoe, 133 Tenn. 57, 64, 179 S.W. 628, 629 (1915). *Accord* Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1651 (1966); *supra* note 145 and accompanying text.

[423] *See, e.g.*, Hill v. Hill, 415 So. 2d 20, 23 (Fla. 1982); Rogers v. Yellowstone Park Co., 97 Idaho 14, 24, 539 P.2d 566, 576 (1975) (Shepard, C.J., dissenting).

[424] Of course, if judges assumed marital harmony to be "good," they probably deemed justification unnecessary. *See supra* note 422 and accompanying text.

from public scrutiny sensitive information that a tort suit might reveal[425] or by requiring spouses to resolve their differences, essentially by forgiving and forgetting.[426] Most courts seem to have been concerned primarily, however, about the burden imposed upon marital relationships by the adversary roles that spouses as litigants would be required to adopt.[427] Because judges provide little guidance, it is appropriate to examine more comprehensively how these actions might threaten tranquility.

Intentional tort cases could jeopardize peace by creating tension that increases throughout the tort litigation process.[428] There are several reasons for this: the behavior in question, while morally reprehensible, degrading, and embarrassing, also may be considered personal and private; a conjugal relationship so insecure that one individual would deliberately injure the other will be quite tenuous;[429] and insurance will not cover the defendant's litigation expenditures or any damages awarded.

There may be friction at each stage of an intentional tort suit. The injured spouse must employ counsel and pay all expenses, perhaps from scarce familial resources.[430] Even under a contingent fee arrangement the plaintiff will be responsible for any costs incurred.[431] Merely filing suit could end the marriage or drastically reduce the possibility of reconciliation. The complaint may be the initial public acknowledgement of the challenged conduct and may include bitterly contested accusations that are exaggerated and hu-

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[425] *See, e.g.*, Austin v. Austin, 136 Miss. 61, 72, 100 So. 591, 592-93 (1924); Lillienkamp v. Rippetoe, 133 Tenn. 57, 64, 179 S.W. 628, 629 (1915). *Accord* Note, *supra* note 420, at 1652; *supra* note 144 and accompanying text.

[426] *See, e.g.*, Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71, 71 (Me. 1980); Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969); *supra* note 148.

[427] *See, e.g.*, Hill v. Hill, 415 So. 2d 20, 23 (Fla. 1982); Lyons v. Lyons, 2 Ohio St. 2d 243, 244, 208 N.E.2d 533, 535 (1965), *overruled*, Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

[428] It is important to distinguish between negligent and intentional torts because different policy and practical considerations apply to retention and abolition of the immunity for each.

[429] *See infra* notes 447-48 and accompanying text.

[430] *See* Hill v. Hill, 415 So. 2d 20, 24 (Fla. 1982). The plaintiff also may lose wages and incur medical costs prior to the resolution of the dispute.

[431] *Cf. id.* at 24 (intentional tort suit inconsistent with public policy proscribing contingent fees in domestic relations matters because can adversely affect reconciliation).

miliating and which reopen old wounds.[432] The defendant must hire a lawyer, who will be paid by the litigant, not an insurer, and may file an equally divisive answer.

During discovery the parties will become more adversarial, essentially proving the "paper" allegations in the pleadings. They may retell, and perhaps relive, the story of how one person willfully, and even maliciously, harmed the other; confront one another with acerbic charges and countercharges involving intimate details of domestic life; and violently disagree over the facts possibly inflated in the pursuit of success.[433] Moreover, these cases are unlikely to settle. They peculiarly become matters of principle, and the parties are not influenced by pressures that insurers can exert.[434]

At trial, the potential for creating connubial discord will be greater. The individuals must testify in the highly-charged atmosphere of a public courtroom. The nature of the behavior—wife battering, sexual abuse, or murder—means that there will be embarrassing media coverage. Moreover, any relief awarded will be divisive because the defendant must pay the damages and may resent the remedy's imposition for other reasons.[435]

Connubial peace may be disturbed even in negligence actions in which the moral tinge of purposeful behavior is absent and insurance coverage ostensibly insulates the marriage from certain tensions. Vehicle collision litigation is illustrative. Filing suit may be unsettling. Use of different counsel and their admonitions against discussing the case can be disconcerting. Recurring recriminations relating to the defendant's driving abilities may be more disruptive. Such allegations, made initially in the complaint, continue throughout discovery, and culminate at trial. Even when spouses are mutually supportive, the reconsideration of how one's carelessness injured the other can be corrosive.[436] Finally, the temptation

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[432] Of course, the police and relatives or friends of the spouses may be aware of the conduct.

[433] *See* Note, *supra* note 422, at 1652; Miller v. Miller, 78 Iowa 177, 183, 42 N.W. 641, 642 (1889); Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 536 (1965) (specific ideas), *overruled*, Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

[434] *See infra* note 442 and accompanying text.

[435] *See* Note, *supra* note 422, at 1652-53 (discussing "other" reasons).

[436] *See* Snowten v. United States Fidelity & Guaranty Co., 475 So. 2d 1211, 1212 (Fla. 1985). A few courts have articulated the "family exchequer" concept, a corollary of the mari-

to defraud insurers may be substantial; acting on that possibility could undermine future familial trust.[437]

There are many responses to these ideas. The contentions that immunity preserves marital harmony while interspousal litigation threatens it can be challenged. The possibility of discord depends substantially on numerous variables that may be present in specific situations. The marital harmony argument is premised on the paternalistic assumption that husbands and wives cannot safeguard their own relationships. But because most people wish to protect their marriages,[438] they should be more competent than courts to ascertain the effect of litigation on domestic life.[439] A number of judges also have observed that when harmony exists, either an action will not be filed, or, if instituted, will not be maintained once peace is endangered.[440]

When the relationship is less secure, so that litigation could be more threatening, different considerations may prevail. If spouses negligently hurt each other, the unintentional character of the conduct and the widespread existence of insurance may minimize potential disruption. The behavior generally lacks the moral reprehensibility, disregard for another's dignity, and insensitivity inherent in willful activity; thus the case probably would not be publicized.[441] Moreover, insurance diminishes the possibility of discord because insurance will pay for defense of the suit and any damages awarded, and settlement is more likely, particularly when

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tal harmony idea, that tort suits will deplete scarce family resources. *See* Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 247-48 (1974) (helpful analysis).

[437] *See* Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969); Rubalcava v. Gisseman, 14 Utah 2d 344, 349, 384 P.2d 389, 392 (1963).

[438] *See* Note, *supra* note 422, at 1652.

[439] *See* Miller v. Fallon County, 721 P.2d 342, 345 (Mont. 1986); Merenoff v. Merenoff, 76 N.J. 535, 551-52, 557, 388 A.2d 951, 959-60, 962 (1978); Freehe v. Freehe, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

[440] *See, e.g.*, Brown v. Brown, 88 Conn. 42, 48-49, 89 A. 889, 891-92 (1914); Immer v. Risko, 56 N.J. 482, 488, 267 A.2d 481, 484 (1970); Digby v. Digby, 120 R.I. 299, 304, 388 A.2d 1, 3 (1978); Freehe v. Freehe, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972) *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

[441] "Garden-variety" negligence cases are not very newsworthy. Even if the dispute were publicized, the information is unlikely to threaten marital harmony because that data would not be embarrassing and might even evoke public sympathy. *See, e.g.*, Guffy v. Guffy, 230 Kan. 89, 89, 631 P.2d 646, 646 (1981), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987).

liability is clear.[442] Some courts have expressed difficulty understanding how precluding interspousal suits for negligently inflicted injury could foster harmony.[443] Other courts have declared that preventing claims might be more divisive than allowing them.[444] Indeed, litigation frequently could preserve, and actually may promote, tranquility. For instance, successful tort actions can eliminate economic burdens like lost wages and medical expenses imposed upon families by negligently caused interspousal harm for which payment otherwise could not be recovered.[445]

The marital harmony rationale for interspousal tort immunity for intentional injury is more problematic. Abolition's proponents have contended, with little elaboration, that when spouses deliberately hurt one another, civil litigation will not endanger harmony because none remains to be preserved.[446] In fact, most actions will only be pursued after separation, divorce, or death, and there probably are a few additional instances in which such claims might not disturb domestic accord.[447] Nevertheless, in some situations, suit could upset the delicate balance theretofore maintained.[448]

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[442] *See* Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986); Digby v. Digby, 120 R.I. 299, 304, 388 A.2d 1, 3 (1978); Surratt v. Thompson, 212 Va. 191, 194, 183 S.E.2d 200, 202 (1971). Insurance also increases the potential for interspousal fraud and collusion. *See infra* notes 457-503 and accompanying text.

[443] *See, e.g.*, Shook v. Crabb, 281 N.W.2d 616, 619 (Iowa 1979); Miller v. Fallon County, 721 P.2d 342, 345 (Mont. 1986); Price v. Price, 732 S.W.2d 316, 318 (Tex. 1987); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 565, 244 S.E.2d 338, 342 (1978).

[444] *See, e.g.*, Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986); Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970); Hack v. Hack, 495 Pa. 300, 314, 433 A.2d 859, 866 (1981).

[445] *See* Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986); Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970); Shearer v. Shearer, 18 Ohio St. 3d 94, 98, 480 N.E.2d 388, 393 (1985); *accord* Note, *supra* note 422, at 1652-53. *Cf.* Cutright, *Income and Family Events: Marital Stability*, 33 J. MARRIAGE & FAM. 291 (1971) (data).

[446] *See, e.g.*, Moran v. Beyer, 734 F.2d 1245, 1247 (7th Cir. 1984); Ebert v. Ebert, 232 Kan. 502, 504, 656 P.2d 766, 768 (1983); Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 88 (1978); Burns v. Burns, 518 So. 2d 1205, 1210 (Miss. 1988) (Griffin, J., dissenting); Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986). Some courts do state that intentional behavior or the pursuit of tort litigation indicates marital disharmony.

[447] For example, the behavior may be so blatant that the perpetrator must acknowledge it, and intentional tort suit then might (1) "bring into the open" a smoldering controversy and resolve it, or (2) eliminate a major source of marital discord. *See* Note, *supra* note 422, at 1652-53. *Cf.* Coffindaffer v. Coffindaffer, 161 W. Va. 557, 567, 244 S.E.2d 338, 343-44 (1978); Note, *supra* note 422, at 1653; Comment, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251, 256 (1975) (suggesting that possibility of interspousal tort suit might preserve marital peace by deterring tortious conduct).

[448] Recent data indicate that 2,000,000 wives are battered annually by husbands. *See*

Thus, it is impossible to verify the accuracy of Professor McCurdy's declaration in 1930 that "there is nothing to show that in the states which permit such actions the peace and harmony of the home are disrupted to any greater extent . . . than in the states which deny the action," or of subsequent, similar pronouncements.[449] It appears, nonetheless, that interspousal tort claims will have little detrimental impact on marital tranquility in numerous circumstances and may protect or even foster peace in some but will seriously jeopardize harmony in only a few.

Even assuming interspousal suits do threaten marital harmony, the validity of the conjugal peace idea itself can be questioned. The litigants' tranquility is not relevant in tort actions involving unrelated individuals, yet their equanimity may be disturbed as much as that of husband and wives in interspousal tort suits.[450] Moreover, the value of attempting to maintain harmony may be debatable in certain situations. For example, the interests of all the family members and society might be served better by ending, rather than perpetuating, marriages in which physical abuse occurs.[451] Some writers have attacked the continuing viability of marriage as an institution,[452] while others have "argued over the nature and extent of a general social interest in marriage stability" and challenged "the fundamental premise that organization into stable families is best for society."[453] Regardless of whether these views are widely shared in America, the citizens of a country in

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Marcus, *supra* note 413, at 1662 n.19. *Cf.* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 14 (1987) (battery of women systematic in one-quarter to one-third of American homes).

[449] McCurdy, *supra* note 3, at 1053. *See* Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986); Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973); W. PROSSER & W.P. KEETON, *supra* note 2, § 122 (subsequent similar pronouncements). *Cf.* Heino v. Harper, 306 Or. 347, 377, 759 P.2d 253, 270 (1988) (no studies, resources, or authorities definitively answer question).

[450] The "matter seems to be inappropriate for judicial consideration." Note, *supra* note 422, at 1651.

[451] *See* Marcus, *supra* note 413, at 1670 (effects on children from families where mother battered by father). Moreover, the marriages most likely to be disrupted by intentional tort suit may least warrant protection. *Cf.* Rogers v. Yellowstone Park Co., 97 Idaho 14, 24, 539 P.2d 566, 576 (1975) (Shepard, C.J., dissenting) (questionable value in perpetuating marriages "which exist in name only").

[452] *See* M. BARRETT, WOMEN'S OPPRESSION TODAY (1980); E. ZARETSKY, CAPITALISM, THE FAMILY, AND PERSONAL LIFE (1976).

[453] *See* the sources cited in Note, *supra* note 422, at 1651-52.

which divorce essentially is available on demand, more than forty percent of all marriages are dissolved, and single persons are the heads of an increasing percentage of households, view wedlock and the family very differently than when the connubial peace concept initially was enunciated.[454] It is also ironic that courts, which rely upon the domestic harmony rationale as the principal policy reason for retaining immunity, relegate married individuals to alternative divorce and criminal remedies, the attempted invocation of which effectively terminates the conjugal relationship.[455] Finally, tort cases are said to be less disruptive than other interspousal actions, such as property claims, permitted today nationwide.[456]

Thus, while the marital harmony concept seems most persuasive of all the contentions traditionally articulated for immunity, the argument is deficient in important respects. It is appropriate, therefore, to examine another significant reason for the rule's continuing strength: the concern that abolition would lead to fraud and collusion between spousal litigants.

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[454] *See* E. GOLANTY & B. HARRIS, MARRIAGE AND FAMILY LIFE 366, 453-54 (1982) (statistical data). *Cf.* Guffy v. Guffy, 230 Kan. 89, 109, 631 P.2d 646, 658 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 162-63, 431 N.E.2d 998, 1004, (Brown, J., dissenting), *cert. denied*, 457 U.S. 1135 (1982); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 565, 244 S.E.2d 338, 342 (1978) (facetious suggestion that if marital harmony is purpose of immunity wife should have no legal actions against husband). The data indicate that forces at work in society are (1) at once broader, and more fundamental, than interspousal immunity, such as those underlying no-fault divorce; (2) ones that have been influenced minimally by abolition; and (3) ones that immunity's retention is essentially powerless to affect. Thus, while it is arguable that the data make immunity's retention more compelling, and that spouses whose marriages deserve protection, but may be jeopardized by tort suit, should be protected, these ideas should not outweigh the important interests of numerous injured spouses. Nevertheless, alternatives to tort suit should be explored for spouses whose marriages may be threatened. *See* Note, *supra* note 422, at 1655 (discussing some options). Wives battered by their husbands also might pursue compensation in dissolution proceedings. *See infra* note 546 and accompanying text. This would protect tenuous marriages from problems created by tort suit, afford battered wives some relief, and eliminate multiple proceedings. *Cf.* Counts v. Counts, 221 Va. 151, 155-56, 266 S.E.2d 895, 897-98 (1980) (option might encourage divorce).

[455] *See infra* notes 542-63 and accompanying text.

[456] *See* Brooks v. Robinson, 259 Ind. 16, 20-21, 284 N.E.2d 794, 796 (1972); Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986); Immer v. Risko, 56 N.J. 482, 488-89, 267 A.2d 481, 484 (1970); Price v. Price, 732 S.W.2d 316, 318 (Tex. 1987). Courts also observe that tort suits are less disruptive than divorce or criminal actions. *See, e.g.*, Shook v. Crabb, 281 N.W.2d 616, 619 (Iowa 1979). This seems disingenuous because these are the "alternative remedies" to which spouses are relegated by jurisdictions retaining immunity, for which relegation they are criticized by courts abolishing immunity.

2. Fraud and Collusion. Some courts retain immunity because they fear that allowing husbands and wives to sue each other will result in fraud and collusion, especially when insurance companies are the real parties in interest.[457] This rationale is the most recent of the five arguments enunciated.[458] Although many cases retaining immunity between 1920 and 1940 involved negligent driving, few mention fraud. Those that do merely include cryptic allusions to the possibility that spouses will raid insurers.[459] Subsequent judicial treatment, however, has been more comprehensive and explicit and is integral to the discussion below.

There are several reasons why the threat of unscrupulous behavior, inherent in all negligence suits when the defendant has insurance coverage, is said to be substantial in interspousal tort actions.[460] The litigants, husband and wife, ordinarily have an intimate personal and confidential relationship.[461] Liability insurance also substitutes the prospect of profit for the risk of financial loss. That potential loss can be great, especially when the victim suffers serious injury and neither other coverage nor familial resources is available.[462] This means that each party and the rest of the family will benefit from a judgment for the plaintiff and will be affected adversely by a verdict for defendant.[463] Moreover, a

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[457] Indeed, Ashdown, *supra* note 436, is premised on this thesis.

[458] It did have an early predecessor, however. *See supra* note 154 and accompanying text. *Cf.* Ashdown, *supra* note 436, at 249 (more background).

[459] Perlman v. Brooklyn City R.R. Co., 117 Misc. 353, 354, 191 N.Y.S. 891, 891 (1921), apparently was the first case to mention fraud. *Cf.* Maine v. J. Maine & Sons Co., 198 Iowa 1278, 1279, 201 N.W. 20, 21 (1924), *overruled*, Stuart v. Pilgrim, 247 Iowa 709, 720, 74 N.W.2d 212, 219 (1956); Harvey v. Harvey, 239 Mich. 142, 146, 214 N.W. 305, 306 (1927) (similar cryptic allusions), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971).

[460] *See* Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969); Immer v. Risko, 56 N.J. 482, 490, 267 A.2d 481, 485 (1970).

[461] *See* Klein v. Klein, 58 Cal. 2d 692, 701, 376 P.2d 70, 76, 26 Cal. Rptr. 102, 108 (1962) (Schauer, J., dissenting); Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); Rubalcava v. Gisseman, 14 Utah 2d 344, 348, 384 P.2d 389, 391 (1963); Tader v. Tader, 737 P.2d 1065, 1070 (Wyo. 1987) (Brown, C.J., dissenting).

[462] *See* Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15, 18 (1957) (Harris, C.J., dissenting); Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 535-36 (1965), *overruled*, Morgan v. Biro Mfg. Co., 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *overruled*, Shearer v. Shearer, 18 Ohio ST. 3d 94, 480 N.E.2d 388 (1985); Smith v. Smith, 205 Or. 286, 310-11, 287 P.2d 572, 583 (1955). Such factors may be exacerbated because those with the least familial resources available also will be least likely to have other coverage.

[463] *See* Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); Robeson v. International Indem. Co., 248 Ga. 306, 308-09, 282 S.E.2d 896, 898 (1981); Tader v. Tader, 737 P.2d 1065, 1070 (Wyo. 1987) (Brown, C.J., dissenting).

tortfeasor could profit from the initial wrongdoing by sharing in the recovery.[464] There also may be powerful temptations to fabricate claims, exaggerate the gravity of the defendant's conduct and the severity of the damage suffered, admit liability, and conceal potential defenses.[465]

Fraud and collusion between spouses may well succeed. Most married individuals are very close and will appreciate the detrimental implications of failure. Evidence favorable to the plaintiff probably will be plentiful and convincing, particularly when no one else witnessed the injurious activity.[466] Jurors usually are sympathetic to any person hurt by someone who appears to be insured.[467] Moreover, the inappropriate behavior of the litigants will be difficult to detect because the spouses usually control the facts and the tortfeasor has little incentive to avert the loss.[468] Consequently, the carrier has been perceived by judges and writers as the defenseless target of scheming spouses.[469]

The resolution of potentially fraudulent disputes can entail substantial costs: those incurred by insurers, and ultimately by policy-

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[464] *See* Burns v. Burns, 111 Ariz. 178, 180, 526 P.2d 717, 719 (1974), *overruled*, Fernandez v. Romo, 132 Ariz. 447, 646 P.2d 878 (1982); Guffy v. Guffy, 230 Kan. 89, 95, 631 P.2d 646, 650 (1981), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Vasey v. Snohomish County, 44 Wash. App. 83, 93-95, 721 P.2d 524, 529-30 (1986). *Cf.* Apitz v. Dames, 205 Or. 242, 274-75, 287 P.2d 585, 599-603 (1955) (discussing typical probate code proscription on profiting by spouse who murders spouse).

[465] *See* Klein v. Klein, 58 Cal. 2d 692, 699-700, 376 P.2d 70, 75-76, 26 Cal. Rptr. 102, 107-08 (1962) (Schauer, J., dissenting); Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969); Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 536 (1965), *overruled*, Morgan v. Biro Mfg. Co. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985); Tader v. Tader, 737 P.2d 1065, 1070 (Wyo. 1987) (Brown, C.J., dissenting).

[466] *See* Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15, 18 (1957) (Harris, C.J., dissenting); Ashdown, *supra* note 436, at 250.

[467] *See* Klein v. Klein, 58 Cal. 2d 692, 701, 376 P.2d 70, 76, 26 Cal. Rptr. 102, 108 (1962) (Schauer, J., dissenting); Smith v. Smith, 205 Or. 286, 311, 287 P.2d 572, 583 (1955).

[468] *See* Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15, 18 (1975) (Harris, C.J., dissenting); Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979) (defendant's incentive), *cert. denied*, 449 U.S. 886 (1980); Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 535-36 (1965), *overruled*, Morgan v. Biro Mfg. Co. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984), and *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985); Ashdown, *supra* note 436, at 252 (spouses control facts).

[469] *See* Matthews v. State Farm Ins. Co., 471 So. 2d 1223, 1225 (Miss. 1985); Varholla v. Varholla, 56 Ohio St. 2d 269, 270, 383 N.E.2d 888, 889 (1978), *overruled*, Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985). *Cf. supra* note 437 and accompanying text (future trust could be impaired when spouses collude).

holders, in litigating these cases, including money paid for judgments and for settlement,[470] and those imposed on the civil justice system in processing claims and in maintaining credibility and public trust.[471] Indeed, some authorities have asserted that courts' abolition of negligence immunity is simply a judicially instituted no-fault compensation scheme.[472]

These concerns about the substantial threat of fraud in interspousal claims have been addressed in numerous ways. Many judges and writers contend that courts in jurisdictions that permit interspousal tort suits have not been burdened with dishonest spouses, even though minimal data support these conclusions.[473] Some observers claim that when harm is perpetrated intentionally, spouses will not conspire because liability insurance never covers that type of damage.[474] In negligence suits, however, other factors apply. Although a few judges acknowledge that this class of cases presents considerable potential for fraud, many have stated that courts should not refuse to hear every such claim.[475] The judges observe that it would be unfair to deny valid claims of numerous married people out of fear that some may act incorrectly[476] and to disappoint the reasonable expectations of those who purchase in-

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[470] *See* Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979) *cert. denied*, 449 U.S. 886 (1980); Brown v. Gosser, 262 S.W.2d 480, 485 (Ky. 1953) (Sims, C.J., dissenting); Rubalcava v. Gisseman, 14 Utah 2d 344, 348, 384 P.2d 389, 391-92 (1963).

[471] *See* Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982); Leach v. Leach, 227 Ark. 599, 604, 300 S.W.2d 15, 19 (1957) (Harris, C.J., dissenting) (credibility and public trust); Tader v. Tader, 737 P.2d 1065, 1070 (Wyo. 1987) (Brown, C.J., dissenting) (costs to civil justice system). *Cf.* Henderson, *supra* note 406, at 468-84, 501-05 (systemic integrity impugned by difficulties of defining contours of interspousal relationship).

[472] *See, e.g.*, Immer v. Risko, 56 N.J. 482, 496, 267 A.2d 481, 489 (1970) (Francis, J., dissenting); Ashdown, *supra* note 434, at 251-53; Henderson, *supra* note 406, at 503-05.

[473] *See* Mosier v. Carney, 376 Mich. 532, 548-49, 138 N.W.2d 343, 347 (1965); Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966), *overruled*, Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) as stated in American Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983); S.A.V. v. K.G.V., 708 S.W.2d 651, 652-53 (Mo. 1986); Shearer v. Shearer, 18 Ohio St. 3d 94, 98-99, 480 N.E.2d 388, 393-94 (1985); Silva v. Silva, 446 A.2d 1013, 1016 (R.I. 1982) (observers); *infra* notes 530; 532 (lack of data).

[474] *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (1973); Givelber, *supra* note 361, at 55 n.65.

[475] *See, e.g.*, Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 159, 431 N.E.2d 998, 1002 (W. Brown, J., dissenting), *cert. denied*, 457 U.S. 1135 (1982); Hack v. Hack, 495 Pa. 300, 315, 433 A.2d 859, 866 (1981).

[476] *See, e.g.*, Campo v. Taboada, 720 P.2d 181, 183 (Hawaii 1986); Boblitz v. Boblitz, 296 Md. 242, 268, 462 A.2d 506, 518 (1983); Digby v. Digby, 120 R.I. 299, 304, 388 A.2d 1, 4 (1978); Davis v. Davis, 657 S.W.2d 753, 757-58 (Tenn. 1983) (Humphries, J., dissenting).

surance to pay for negligently suffered damages.[477] They also believe that persons hurt by another's unreasonable conduct are entitled to seek redress[478] and that judges cannot abdicate their responsibility to adjudicate potentially legitimate disputes, but must rely upon the safeguards of the tort litigation system to separate fraudulent claims from meritorious ones.[479]

Safeguards do exist, as early as the time of injury, to protect courts against fraud by spouses. For instance, independent witnesses may have observed the allegedly harmful behavior,[480] and the insured is obligated to cooperate with his or her insurance carrier.[481] During discovery, several techniques can be employed to guard against colluding plaintiffs and defendants.[482] Similarly, many procedures available at trial afford protection. For example, defense counsel's cross-examination may expose dishonest conduct.[483] The testimony of spouses will be especially susceptible to

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[477] *See* Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970); *cf.* Beaudette v. Frana, 285 Minn. 366, 371, 173 N.W.2d 416, 419 (1969); Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973) (similar allusions).

[478] *See, e.g.*, S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo. 1986); Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986); Digby v. Digby, 120 R.I. 299, 304-05, 388 A.2d 1, 4 (1978). *Cf. infra* note 568 and accompanying text (concept in many state constitutions).

[479] *See* Flagg v. Loy, 241 Kan. 216, 220-21, 734 P.2d 1183, 1186-87 (1987); Burns v. Burns, 518 So. 2d 1205, 1211 (Miss. 1988); Price v. Price, 732 S.W.2d 316, 318 (Tex. 1987). Relevant experience is derived from states that did not use an elevated standard of care in the guest passenger situation or adopted it and later abolished it. *See* S.A.V. v. K.G.V., 708 S.W.2d 651, 652-53 (Mo. 1986); Immer v. Risko, 56 N.J. 482, 490-95, 267 A.2d 481, 485-88 (1970). Some courts and writers have argued that many jurisdictions already permit suits between individuals in relationships equally close to marriage, which pose equivalent danger. *See* Klein v. Klein, 58 Cal. 2d 692, 695-96, 376 P.2d 70, 72-73, 26 Cal. Rptr. 102, 104-05 (1962); Campo v. Taboada 720 P.2d 181, 183 (Hawaii 1986); Merenoff v. Merenoff, 76 N.J. 535, 553-54, 388 A.2d 951, 960-61 (1978).

[480] *See* Rupert v. Stienne, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974); Merenoff v. Merenoff, 76 N.J. 535, 558, 388 A.2d 951, 963 (1978); Silva v. Silva, 446 A.2d 1013, 1016 (R.I. 1982) (this and other protective measures).

[481] *See* Guffy v. Guffy, 230 Kan. 89, 111, 631 P.2d 646, 659 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); *cf.* Nocktonick v. Nocktonick, 227 Kan. 758, 769, 611 P.2d 135, 142 (1980); Silva v. Silva, 446 A.2d 1013, 1016 (R.I. 1982) (parent-child immunity cases discussing obligation and insurers' protections).

[482] *See* Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 163, 431 N.E.2d 998, 1005, (C. Brown, J., dissenting), *cert. denied*, 457 U.S. 1135 (1982). *Cf.* Coffindaffer v. Coffindaffer, 161 W. Va. 557, 565, 244 S.E.2d 338, 342 (1978) (it becomes "totally strained to believe a substantial personal injury can be faked through the rigors of available discovery techniques").

[483] *See* Mosier v. Carney, 376 Mich. 532, 549, 138 N.W.2d 343, 347 (1965); Rupert v. Stienne, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974); Bonkowsky v. Bonkowsky, 69 Ohio

impeachment on the basis of partiality and interest.[484] The trial judge's obligation to instruct jurors on witness credibility and requirements respecting the weight of evidence remain the same in these cases.[485] Moreover, juries generally are quite capable of ascertaining the falsity of claims that present as much potential for incorrect activity as interspousal suits.[486] Furthermore, when a trial judge believes that jurors have failed to detect fraud or collusion, he or she always can modify the jury determination.[487] Finally, a number of persons may be deterred from acting improperly by the rigorous efforts of insurance companies and defense counsel and by the threat of criminal prosecution.[488]

Courts and commentators have suggested that safeguards other than these tested devices be employed when they are found inadequate to protect against fraud and collusion. Judges could impose an elevated standard of conduct or burden of proof tailored to the misbehavior perceived in specific circumstances.[489] The aggravated misconduct requirement imposed in many vehicle guest statutes might seem to afford a convenient antidote.[490] A standard of care

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St. 2d 152, 157 n.2, 431 N.E.2d 998, 1001 n.2 (W. Brown, J., dissenting), *cert. denied*, 457 U.S. 1135 (1982).

[484] *See* Brooks v. Robinson, 259 Ind. 16, 22, 284 N.E.2d 794, 797 (1972). *Cf.* Guffy v. Guffy, 230 Kan. 89, 111, 631 P.2d 646, 659 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Miller v. Fallon County, 721 P.2d 342, 345 (Mont. 1986) (judges and juries naturally mindful of relationship and alert to improper conduct).

[485] *See Brooks*, 259 Ind. at 22, 284 N.E.2d at 797; Merenoff v. Merenoff, 76 N.J. 535, 554, 388 A.2d 951, 961 (1978).

[486] *See Brooks*, 259 Ind. at 22, 284 N.E.2d at 797; *Shook*, 281 N.W.2d at 620; Burns v. Burns, 518 So. 2d 1205, 1210-11 (Miss. 1988) (Griffin, J., dissenting); *Rupert*, 90 Nev. at 401, 528 P.2d at 1015.

[487] Courts can grant motions for a directed verdict or judgment notwithstanding the verdict. Experience indicates that trial judges can detect fraud in intrafamily tort litigation. *See* Nocktonick v. Nocktonick, 227 Kan. 758, 768-69, 611 P.2d 135, 142 (1980); Briere v. Briere, 107 N.H. 432, 434-35, 224 A.2d 588, 590 (1966); Hollister, *supra* note 11, at 501-02 n.89.

[488] *See* Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982); Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 157 n.2, 431 N.E.2d 998, 1001 n.2 (W. Brown, J., dissenting) (deterrent effect of perjury charge), *cert. denied*, 457 U.S. 1135 (1982); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 565-66, 244 S.E.2d 338, 342-43 (1978) (efforts of insurers and counsel). Of course, the potential for marital disharmony can be directly proportional to the rigor with which the mechanisms available are applied.

[489] *See* Beaudette v. Frana, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969); *Merenoff*, 76 N.J. at 554, 388 A.2d at 961.

[490] "In addition to 'gross negligence,' the required form of aggravation is variously speci-

analogous to gross negligence should not be employed in interspousal suits, however, because alternatives, such as safeguards in the tort litigation process, can better combat fraud.[491] A few courts even have suggested that an insurance carrier might disclose its interest in the case and designate the defendant an adverse witness to show that the parties may be conspiring.[492] Finally, numerous jurists have remarked that dishonest interspousal activity will become a matter for legislatures, should all the protections examined above prove insufficient.[493]

There are additional responses to the more tangential elements of the fraud and collusion rationale. Some authorities have recognized that this rationale and the marital harmony argument are essentially contradictory. One court observed:

> To the extent the threat of marital disharmony can be removed or reduced by the presence or availability of insurance, the potential for fraud is increased; conversely, when the threat of fraud is minimized or eliminated because there is no insurance or insurer to be victimized, the risk of creating marital friction is correspondingly augmented.[494]

In response to the concern that individuals who negligently hurt their spouses might benefit, courts have stated that they can tailor appropriate relief to newly recognized causes of action.[495] More-

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fied as 'intentional,' 'willful,' 'wanton,' or 'reckless' misconduct, acting 'in disregard of the safety of others,' 'intoxication,' or some combination of these." W. PROSSER & W.P. KEETON, *supra* note 2, § 34.

[491] The safeguards mentioned *supra* notes 480-88 and *infra* note 492 and in the text accompanying those notes should protect insurers. Insurers also can rely upon spousal exclusion clauses. *See infra* notes 498-500 and accompanying text. *Cf.* Brown v. Merlo, 8 Cal. 3d 855, 872-88, 506 P.2d 212, 224-28, 106 Cal. Rptr. 388, 400-404, (1973); W. PROSSER & W.P. KEETON, *supra* note 2, § 34 (more discussion of "collusion prevention").

[492] *See* Merenoff v. Merenoff, 76 N.J. 535, 554, 388 A.2d 951, 961 (1978); *Coffindaffer*, 161 W. Va. at 567, 244 S.E.2d at 343. *Accord* S.A.V. v. K.G.V., 708 S.W.2d 651, 653 n.2 (Mo. 1986).

[493] *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 695-96, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962); Burns v. Burns, 518 So. 2d 1206, 1211 (Miss. 1988) (Griffin, J., dissenting); Digby v. Digby, 120 R.I. 299, 305, 388 A.2d 1, 4 (1978); Freehe v. Freehe, 81 Wash. 2d 183, 189, 500 P.2d 771, 775 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

[494] *Merenoff*, 76 N.J. at 552-53, 388 A.2d at 960. *Accord S.A.V.*, 708 S.W.2d at 653 n.2; Hack v. Hack, 495 Pa. 300, 314, 433 A.2d 859, 866 (1981); Price v. Price, 732 S.W.2d 316, 317 (Tex. 1987).

[495] *See, e.g.*, Guffy v. Guffy, 230 Kan. 89, 113-14, 631 P.2d 646, 661 (1981) (Prager, J.,

over, although the resolution of potentially fraudulent suits can be expensive, the costs are not greater than those imposed by much similar litigation[496] or by systematically excluding an entire class of claimants.[497] Another observation made by some judges who abolished immunity is that insurers can protect themselves against fraudulent litigants by refusing to provide spousal coverage.[498] In jurisdictions that permit such exclusions, however, the purpose of abrogation would be vitiated,[499] and a few courts have expressly held that spousal exclusion clauses violate public policy.[500]

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dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Flores v. Flores, 84 N.M. 601, 604, 506 P.2d 345, 348, *cert. denied*, 84 N.M. 592, 506 P.2d 336 (1973); *cf.* Fernandez v. Romo, 132 Ariz. 447, 451-52, 646 P.2d 878, 882-83 (1982); *Freehe*, 81 Wash. 2d at 191-92, 500 P.2d at 776-77 (community property context).

[496] An example is suit filed by a passenger injured because of the insured operator's negligent driving when the two parties are friends. *See supra* note 479 and accompanying text. Moreover, no evidence indicates that large costs have been imposed on the civil justice system due to the processing of potentially fraudulent interspousal suits. *See supra* note 471. *Cf.* McCurdy, *supra* note 3, at 334-35; Comment, *Interspousal Immunity Rule and the Effect of Liability Insurance in Automobile Accidents*, 11 S.D.L. REV. 144, 151 (1966) (no evidence in states abolishing immunity that abrogation caused large insurance rate increase). *But cf. supra* text accompanying note 473 (minimal data support conclusion that courts not burdened with dishonest spouses).

[497] Indeed, the credibility of the civil justice system and public trust, *see supra* note 472, may be undermined more by denying numerous spouses tort suits, *see supra* notes 474-78 and accompanying text, especially in states whose constitutions mandate that injured persons be permitted to pursue relief, *see infra* note 571 and accompanying text. One response to the concern that systemic integrity will be impugned because of the difficulty of defining the contours of interspousal relationships, *see supra* note 471, is that judges and juries can differentiate similar conduct involving strangers which would be actionable from that between spouses which would not. *See infra* notes 538-40 and accompanying text.

[498] *See, e.g.*, Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 158 n.5, 431 N.E.2d 998, 1002 n.5 (W. Brown, J., dissenting), *cert. denied*, 457 U.S. 1135 (1982); Hack v. Hack, 495 Pa. 300, 315, 433 A.2d 859, 866 (1981). *Cf.* Ashdown, *supra* note 436, at 254-60 (analysis of exclusionary clauses).

[499] Exclusions allow insurers to avoid compensating persons negligently injured by their spouses, a principal purpose of allowing interspousal claims. *See infra* notes 569-73 and accompanying text; Ashdown, *supra* note 436, at 255. Exclusionary clauses are widely used today, *see id.* at 253, and most states do allow them, *see infra* note 500. *See also* Dairyland Ins. Co. v. Finch, 32 Ohio St. 3d 360, 366, 513 N.E.2d 1324, 1330 (1987) (Sweeney, J., dissenting); Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987) (Mauzy, J., concurring).

[500] The leading case invalidating family exclusion clauses is Meyer v. State Farm Mutual Automobile Ins. Co., 689 P.2d 585 (Colo. 1984). *Cf.* Transamerica Ins. Co. v. Royle, 202 Mont. 173, 656 P.2d 820 (1983) (same in parent-child immunity context). A few legislatures have proscribed the clauses. *See, e.g.*, WIS. STAT. ANN. § 632.32(6)(b) (West 1980). Most no-fault statutes so provide. *See, e.g.*, N.J. STAT. ANN. § 39:6A-4 (West 1972); OR. REV. STAT. § 743.800 (1974). *But cf.* Allstate Ins. Co. v. Elwell, 513 A.2d 269, 273 (Me. 1986); Dairyland Ins. Co. v. Finch, 32 Ohio St. 3d 360, 364, 513 N.E.2d 1324, 1329 (1987) (clear majority of

Because the collusion rationale does not seem to be supported by the experience of states eliminating the doctrine, is overinclusive, and frustrates achievement of the compensatory goal of tort law, the argument is not very persuasive.[501] Nevertheless, it is naive to ignore the "potential for recovery based on fraud [that] clearly exists and cannot be lightly dismissed through judicial rationalizations about the inherent ability of the system to determine the truth."[502] The Minnesota Supreme Court accurately summarized the difficulty posed by collusion when it declared that a "minimum challenge to judicial resourcefulness will be to act promptly and firmly at any appearance of . . . fraudulent interspousal claims."[503] The only additional argument that now has much vitality is that courts should defer to legislatures.

3. Deference to the Legislature. Numerous judges have held that the abrogation issue should be resolved by legislators and not by courts.[504] The principal form in which the deference concept was cast prior to 1950, however, was as a response to the question of whether the Married Women's statutes prescribed interspousal tort claims. Cases decided before 1950 invariably included passages like the following:

> If such a radical change is to be made in the common-law rights and liabilities of married persons, [authorizing a wife to sue her husband for negligently inflicted injuries,] it must be made by clear enactment of the General Assembly, and not by this court in giving an unwarranted construction to the meaning of the statute law relating to the property rights of married women.[505]

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courts uphold clauses).

[501] *See infra* note 561 and accompanying text (persuasiveness); *infra* notes 569-73 and accompanying text (compensatory goal).

[502] Ashdown, *supra* note 436, at 251. Ashdown did say, however, that "indictment of immunity-free systems may be premature" because "there is no evidence that fraudulent or collusive actions have increased in jurisdictions" abolishing immunity. *Id.*

[503] Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 420 (1969).

[504] The election of judges in some states adds an interesting dimension to the deference question. *See, e.g.*, MONT. CODE ANN. § 3-2-101 (1981); N.Y. CONST. art. 6, § 2. For valuable treatment of many issues considered here, see R. KEETON, *supra* note 339.

[505] Oken v. Oken, 44 R.I. 291, 293, 117 A. 357, 358 (1922), *overruled*, Digby v. Digby, 120 R.I. 299, 388 A.2d (1978). The passages always appear in early cases but they also are in some more recent opinions. *See, e.g.*, Raisen v. Raisen, 379 So. 2d 352, 354 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); Freethy v. Freethy, 42 Barb. 641, 644-45 (N.Y. Sup. Ct. 1865);

The authors of those opinions also seemed to be saying that legislatures, by passing such measures, effectively had "preempted" judicial alteration of the immunity concept.[506]

Judges writing decisions after mid-century offer additional reasons for acceding to legislatures. Many courts have premised deference on the authority possessed by legislators[507] or on the need for certainty in the legal system.[508] Numerous judges have found the abolition of immunity to have such farreaching implications[509] or to be so affected with a public interest in marriage[510] that it must be left to legislatures. Courts also have evinced concern about the comparative qualifications of the two branches of government. Legislative bodies are said to be better equipped to investigate and study issues pertaining to abrogation,[511] free of the constraints that litigants impose in a specific judicial proceeding,[512] and more competent to treat abolition comprehensively. This last idea is especially significant because abrogation could affect many areas of law

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McKinney v. McKinney, 59 Wyo. 204, 219-21, 231-33, 135 P.2d 940, 944-45, 950 (1943). Of course, when a statute proscribes immunity the "rule is not for judicial discard without compelling reasons." Peters v. Peters, 63 Haw. 653, 658, 634 P.2d 586, 590 (1981).

[506] The authors simply proclaimed that the Acts did not abrogate immunity and rarely treated immunity as a public policy issue. *See, e.g.*, Strom v. Strom, 98 Minn. 427, 428, 107 N.W. 1047, 1048 (1906), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969); Von Laszewski v. Von Laszewski, 99 N.J. Eq. 255, 133 A. 179, 180 (1926). Indeed, there is a sense in which Acts not specifically prescribing tort suit were treated as a sixth traditionally espoused reason for retention.

[507] *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 697-99, 376 P.2d 70, 74-75, 26 Cal. Rptr. 102, 106-07 (1962) (Schauer, J., dissenting); Burns v. Burns, 518 So. 2d 1205, 1217 (Miss. 1988) (Griffin, J., dissenting); Brawner v. Brawner, 327 S.W.2d 808, 814 (Mo. 1959), *cert. denied*, 361 U.S. 964 (1960), *overruled*, Townsend v. Townsend, 708 S.W.2d 646 (Mo. 1986); Stoker v. Stoker, 616 P.2d 590, 594 (Utah 1980) (Crockett, C.J., dissenting).

[508] *See, e.g.*, Robeson v. International Indem. Co., 248 Ga. 306, 309, 282 S.E.2d 896, 899 (1981); Guffy v. Guffy, 230 Kan. 89, 96, 631 P.2d 646, 651 (1981), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Rubalcava v. Gisseman, 14 Utah 2d 344, 351, 384 P.2d 389, 393 (1963).

[509] *See, e.g.*, S.A.V. v. K.G.V., 708 S.W. 2d 651, 655-56 (Mo. 1986) (Welliver, J., concurring in part); Crowell v. Crowell, 180 N.C. 516, 525-31, 105 S.E. 206, 211-14 (1920) (Walker & Hoke, JJ., dissenting).

[510] *See, e.g.*, Alfree v. Alfree, 410 A.2d 161, 162 (Del. 1979), *appeal dismissed*, 446 U.S. 931 (1980); Peters v. Peters, 63 Haw. 653, 659, 634 P.2d 586, 590 (1981); Guffy v. Guffy, 230 Kan. 89, 97, 631 P.2d 646, 651 (1981), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987).

[511] *See Robeson*, 248 Ga. at 310, 282 S.E.2d at 899; Boblitz v. Boblitz, 296 Md. 242, 282-88, 462 A.2d 506, 524-27 (1983) (Couch, J., dissenting); *S.A.V.*, 708 S.W.2d at 655-56 (Blackmar, J, concurring).

[512] *See Alfree*, 410 A.2d at 163.

and policy, particularly those in which elected representatives already have spoken.[513]

Judges in a substantial majority of jurisdictions, however, have not deferred to the legislatures. These courts have determined that immunity was not statutory. Instead, they found that immunity was created and preserved by the judiciary, or originated at common law and, therefore, could be modified on policy grounds by courts.[514] They assume that those Married Women's Acts that fail to prescribe expressly interspousal tort suits do not address immunity with sufficient precision to preclude subsequent judicial modification.[515]

There are numerous additional responses to the deference argument that relate less directly to the Married Women's Acts. Alteration of immunity is neither more radical nor engenders greater uncertainty than modification of many other tort rules that originated at common law.[516] Courts also need not accede on the

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[513] *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 697-99, 376 P.2d 70, 74-75, 26 Cal. Rptr. 102, 106-07 (1962) (Schauer, J., dissenting); Brawner v. Brawner, 327 S.W.2d 808, 813 (Mo. 1959), *cert. denied*, 361 U.S. 964 (1960); Davis v. Davis, 657 S.W.2d 753, 759 (Tenn. 1983) (Harbison, J., dissenting). The insurance and family law fields are classic examples.

[514] *See, e.g.*, Fernandez v. Romo, 132 Ariz. 447, 449, 646 P.2d 878, 880 (1982); Townsend v. Townsend, 708 S.W.2d 646, 649-50 (Mo. 1986); Miller v. Fallon County, 721 P.2d 342, 344 (Mont. 1986); Shearer v. Shearer, 18 Ohio St. 3d 94, 99, 480 N.E.2d 388, 394 (1985); Flagg v. Loy, 241 Kan. 216, 222, 734 P.2d 1183, 1188 (1987); Burns v. Burns, 518 So. 2d 1205, 1208 (Miss. 1988). *Cf.* Digby v. Digby, 120 R.I. 299, 301, 388 A.2d 1, 2 (1978) (judicial abdication by refusal to reconsider unsatisfactory court-made rule). *See generally* Fernandez v. Romo, 132 Ariz. 447, 448-49, 646 P.2d 878, 879-80 (1982); *supra* note 123 and accompanying text (although tort immunity arguably "statutory" to same extent any rule that existed at common law was made so by passing common law "reception" statute; immunity technically not a common law rule as such).

[515] Such treatment is appropriate given the lack of clarity regarding legislative intent as to tort immunity. *See supra* notes 66-114 and accompanying text. If legislators did not address immunity, they could not have meant to "occupy the field." Indeed, the Oregon Supreme Court recently stated that tort immunity was not a "matter in which the legislature has purported to pre-empt the field." Heino v. Harper, 306 Or. 347, 378, 759 P.2d 253, 271 (1988). In any event, courts today should not be bound by unclear, old statutes; judges simply should treat immunity, like any other tort doctrine said to arise at common law, as one to be modified on public policy grounds.

[516] For example, the remaining immunities and contributory negligence have been modified by courts in many states. The California Supreme Court has altered each. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (contributory negligence); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (abrogating parent-child immunity); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (abrogating governmental immunity), *modified sub nom.* Corning Hosp. Dist. v. Super. Ct., 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962); Malloy

basis of legislatures' relative competence. The problem of abrogation, in contrast to questions like the adoption of no-fault compensation, is not complex and requires minimal data for its resolution. Indeed, most of that small number of important policy issues to be addressed can be treated more effectively by judges than legislators. Disputes involving questions of marital harmony constitute a staple of state court workloads. Moreover, judges have greater experience with fraud in the tort litigation process, know more about the difficulties presented by excessive and trivial claims, and have greater familiarity with the relief actually provided by the alternative remedies.[517] Numerous fields of law and policy said to be influenced by abolition would be affected only slightly.[518] Furthermore, in those few remaining areas in which abrogation might have more impact that courts cannot handle proficiently, legislatures always can augment judicial pronouncements.[519]

Thus, the litany of reasons recited for deference is less convincing than the opposing arguments. An explanation for this is that courts may have resolved the abolition issue on more "substantive" grounds, such as marital harmony, and then conformed their treatment of deference to that determination.[520] Moreover, the deference rationale could be applied to most requests to recognize new causes of action, and, in this way, is similar to the contention that abrogation would "open the floodgates" of litigation.

4. Quantity and Quality of Litigation. Judges have feared that

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v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951) (abrogating charitable immunity). There is no reliance interest worthy of protection because few spouses modify their behavior to accord with interspousal tort rules. *Cf. supra* note 498 (insurers can exclude spouses or modify rate structures).

[517] The traditional arguments favoring immunity are discussed in the rest of this subsection of the Article. Courts also are as competent as legislatures to treat the traditional ideas favoring immunity's abolition, discussed *infra* notes 546-78 and accompanying text.

[518] For example, issues of insurance law are said to be affected. Most would be influenced indirectly, however, and those affected more directly can be otherwise treated. *See supra* notes 489-92 and accompanying text.

[519] For instance, issues of family law are said to be affected. Some, such as whether interspousal communications are privileged, now have been resolved, but others may warrant legislative treatment.

[520] *See infra* note 564 and accompanying text. *Cf.* Guffy v. Guffy, 230 Kan. 89, 97, 106-07, 631 P.2d 646, 651, 656 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987) (authors of majority, dissenting opinions reach opposite conclusions on deference by relying upon ideas at different pages of same book by Judge Cardozo).

abolition would result in too many suits and would permit frivolous or trivial claims. An early opinion addressed the issue of excessive litigation:

> If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be . . . . The statute of limitations could not cut off actions . . . with divorces as common as they are now-a-days, there would be new harvests of litigation . . .[521]

In examining the problem of meritless claims, most courts only provide examples, expressing concern about matters like petty domestic quarrels.[522] Several judges have conjured up a "parade of horribles," such as imposing liability upon one who leaves shoes where his or her spouse can trip over them.[523] A recent illustration is the claim filed by a wife against her husband for injuries she sustained because he failed to shovel their sidewalk.[524] Another potential difficulty is vindictive intentional tort actions pursued upon divorce.[525] Professor McCurdy found that courts apparently are saying that it would be "undesirable to make possible liability for assault and battery every time one spouse touches the other, or liability for negligence every time the household is improperly managed."[526]

The cases afford little additional guidance, especially regarding

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[521] Abbott v. Abbott, 67 Me. 304, 308 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71, 71 (Me. 1980). Later cases add little. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611, 617-18 (1910). *Cf. infra* note 547 and accompanying text (judicial economy argument for requiring spouses to seek relief from tortious injury under divorce law).

[522] *See, e.g.*, Bandfield v. Bandfield, 117 Mich. 80, 82, 75 N.W. 287, 288 (1898) (suit over "every real and fancied wrong"), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920) (suits by "peevish fault-finding husband . . . or . . . nagging ill-tempered wife"), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969). *Cf.* Harris v. Harris, 252 Ga. 387, 389, 313 S.E.2d 88, 90 (1984) (Weltner, J., dissenting); S.A.V. v. K.G.V., 708 S.W.2d 651, 653 (Mo. 1986) (uninvited kiss upon unconsenting brow could be assault).

[523] *See, e.g.*, Rogers v. Yellowstone Park Co., 97 Idaho 14, 22, 25, 539 P.2d 566, 574, 577 (1975) (Shepard, C.J.; Bakes, J., dissenting); Immer v. Risko, 56 N.J. 482, 499, 267 A.2d 481, 490 (1970) (Francis, J., dissenting).

[524] The case is Brown v. Brown, 381 Mass. 231, 231, 409 N.E.2d 717, 717 (1980).

[525] *See, e.g.*, Browning v. Browning, 584 S.W.2d 406, 408 (Ky. 1979); Weicker v. Weicker, 22 N.Y.2d 8, 11, 237 N.E.2d 876, 877, 290 N.Y.S.2d 732, 734 (1968).

[526] McCurdy, *supra* note 2, at 1053. *Accord* Courtney v. Courtney, 184 Okla. 395, 402, 87 P.2d 660, 667 (1938).

the implications of "opening the floodgates." Many courts seem concerned about maintaining the integrity of the civil justice system.[527] A few have mentioned the problems entailed in distinguishing similar behavior between strangers which would be tortious from that involving spouses which would not,[528] and a number appear troubled by the same uncertainties that traditionally have plagued judges when they are asked to modify a longstanding tort doctrine.[529]

There are numerous responses to these considerations. No evidence suggests that the elimination of interspousal immunity actually has fostered too much litigation or encouraged frivolous or trivial suits. A number of courts have observed that states abolishing the doctrine have not been inundated, although minimal evidence appears to underlie these assertions.[530] Even were the caseload larger, potentially legitimate claims should not be excluded because they might be burdensome: fundamental purposes of the judicial system are to afford individuals a "day in court" and to redress injury.[531]

A few judges maintain that jurisdictions abrogating immunity

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[527] Courts are concerned about the need for judicial economy and efficiency and maintaining credibility and public trust. *See, e.g.*, Harris v. Harris, 252 Ga. 387, 389, 313 S.E.2d 88, 90 (1984) (Weltner, J., dissenting) (every cruel word discussed for days before jury, consuming court time and taxpayer resources).

[528] The idea, mentioned first a century ago, *see* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 34 (Davis, J., dissenting), *rev'd*, 89 N.Y. 644 (1882), has been raised recently, *see, e.g.*, S.A.V. v. K.G.V., 708 S.W.2d 651, 656 (Mo. 1986) (Welliver, J., concurring); Merenoff v. Merenoff, 76 N.J. 535, 555-59, 388 A.2d 951, 961-63 (1978). *Cf.* Henderson, *supra* note 406, at 501-05 (interspousal tort suit requires defining contours of relationship).

[529] "Fear of the new" seems to be particularly troublesome. *Cf.* W. PROSSER & W.P. KEETON, *supra* note 2, § 4, *citing* L. GREEN, JUDGE AND JURY 77-99 (1930) (courts always dread "flood of litigation" involving problems they are not prepared to treat). In fairness, however, burdening an overworked judiciary with trivial cases certainly is a valid concern. *See supra* note 527.

[530] *See* Klein v. Klein, 58 Cal. 2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Rupert v. Stienne, 90 Nev. 397, 403, 528 P.2d 1013, 1016 (1974); Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973); Freehe v. Freehe, 81 Wash. 2d 183, 188, 500 P.2d 771, 775 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). *Cf. infra* note 532 (lack of data).

[531] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *infra* notes 570-71 and accompanying text. The requirement that spouses seek relief from tortious harm in dissolution proceedings, *see supra* note 521, may conserve some judicial resources. But the savings will be small, and the requirement may have disadvantages. *See infra* notes 542-63 and accompanying text. Should interspousal tort litigation increase caseloads, courts could apply ameliorative measures.

also have not been overrun by spouses pursuing frivolous litigation, although, here as well little data seem to support the observations.[532] Moreover, similar tort doctrines have been altered with minimal apparent consequence.[533] The prosecution of insignificant actions frequently should be deterred by the good sense and restraint of married persons and their attorneys[534] and by the difficulty of securing judgments that make suit worthwhile.[535] Should the threat of nonmeritorious claims materialize, protections of the tort litigation process can be invoked.[536] For instance, most safeguards used to combat fraud could be equally efficacious in this

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[532] *See Klein*, 58 Cal. 2d at 694, 376 P.2d at 72, 26 Cal. Rptr. at 104; Guffy v. Guffy, 230 Kan. 89, 111-12, 631 P.2d 646, 660 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); Courtney v. Courtney, 184 Okla. 395, 403, 87 P.2d 660, 668 (1938). *Accord* McCurdy, *supra* note 3, at 1053. The difficulty with the judicial observations, *see* text accompanying this note and *supra* note 530, is that they appear not to be based upon reliable evidence. Several cases rely upon prior decisions: *Shook* citing *Richard*, *Rupert* citing *Freehe*, and *Guffy* citing *Richard* and *Rupert*. The earlier decisions, in turn, rely upon commentators. *See, e.g.*, *Richard*, 131 Vt. at 105, 300 A.2d at 641; *Freehe*, 81 Wash. 2d at 188, 500 P.2d at 775. A few courts simply conclude without substantiation that there is nothing detrimental in the experience of states abolishing immunity. *See, e.g.*, *Klein*, 58 Cal. 2d at 694, 376 P.2d at 72, 26 Cal. Rptr. at 104; *Richard*, 131 Vt. at 105, 300 A.2d at 641. No systematic study apparently has been undertaken. *See* Letter from Marilyn M. Roberts, Research Director, National Center for State Courts, to Carl Tobias (April 22, 1981).

[533] Parent-child tort immunity provides the most relevant example. *See* Rupert v. Stienne, 90 Nev. 397, 403, 405 528 P.2d 1013, 1016, 1018 (1974) *Cf.* Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980); Hollister, *supra* note 11, at 525-27 (minor adjustments); W. PROSSER & W.P. KEETON, *supra* note 2, § 4, at 23-24 (other tort areas).

[534] *Cf.* Balts v. Balts, 273 Minn. 419, 433, 142 N.W.2d 66, 75 (1966) (same in context of parent-child tort immunity), *overruled*, Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980), as stated in American Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983); *id.*, 273 Minn. at 430, 142 N.W. at 73 (lawyers unlikely to encourage meritless suits when contingent fee arrangement exists).

[535] *See* Goode v. Martinis, 58 Wash. 2d 229, 234, 361 P.2d 941, 944 (1961). Litigants must (1) hire counsel, (2) prove injury and damage, and (3) have incurred damages that, and be married to someone whose assets, make litigation worthwhile. *Cf. Balts*, 273 Minn. at 430, 142 N.W.2d at 73 (holding that family members unlikely to incur large legal expense when no promise of success exists).

[536] *See* S.A.V. v. K.G.V., 708 S.W.2d 651, 654-55 (Mo. 1986) (Welliver, J., concurring in part); Freehe v. Freehe, 81 Wash. 2d 183, 188, 500 P.2d 771, 775 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). Some courts mention specifically the defenses of assumption of risk and consent, *see, e.g.*, Hack v. Hack, 495 Pa. 300, 315-16, 433 A.2d 859, 867 (1981); *Freehe*, 81 Wash. 2d at 188, 500 P.2d at 775, or adjusting the duty of care to the " 'give-and-take' of married life," *S.A.V.*, 708 S.W.2d at 653. The protections also can apply to the vindictive intentional tort action pursued upon divorce. *See supra* note 525 and accompanying text.

context.[537] Furthermore, judges and juries generally should be able to distinguish similar behavior between strangers which would be actionable from that involving spouses which is not.[538] Several jurists and the drafters of the *Restatement (Second) of Torts* recently have addressed this difficulty, although they have "not yet worked out a full analysis of the proper legal treatment."[539] Nonetheless, both have developed numerous suggestions for handling the problem, and it appears solvable.[540]

Therefore, the "floodgates" argument, like the fraud idea, does not appear to be substantiated by the experience of jurisdictions abrogating immunity. Its application would be overinclusive and would violate basic tenets of the legal system, while most difficulties posed would be amenable to resolution. Consequently, the rationale has virtually no strength today. Indeed, it may have been employed to buttress other rationales, particularly marital harmony, as the following quotation suggests:

> [Abolition would] open up a field for marring or disturbing the tranquility of family relations . . . by dragging into court for judicial investigation at the suit of a peevish, faultfinding husband, or at the suit of a nagging, ill-tempered wife, *matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten.*[541]

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[537] *See supra* notes 480-92 and accompanying text.

[538] *See* Mosier v. Carney, 376 Mich. 532, 545-46, 138 N.W.2d 343, 345 (1965); *S.A.V.*, 708 S.W.2d at 653; Courtney v. Courtney, 184 Okla. 395, 403-04, 87 P.2d 660, 668-69 (1938).

[539] RESTATEMENT (SECOND) OF TORTS § 895F (1979). The Restatement drafters and the New Jersey Supreme Court have provided especially cogent treatment and recommendations. *See id.*; Merenoff v. Merenoff, 76 N.J. 535, 535, 388 A.2d 951, 951 (1978). *Cf.* Heino v. Harper, 306 Or. 347, 377-78, 759 P.2d 253, 270-71 (1988) (subscribing to treatment and offering additional suggestions).

[540] Certain difficulties do remain. For example, the *Restatement*'s "reasonable spouse" approach may need elaboration, and its explanations of available defenses are unclear. Moreover, *Merenoff*'s application of vestigial immunity to trivial claims is unwarranted, 76 N.J. at 555, 388 A.2d at 961. In response to the uncertainties that plague judges when asked to modify traditional tort doctrines, *see supra* note 529 and accompanying text, some have said that often these fears are inflated and courts "find some workable method of affording redress." W.P. KEETON, *supra* note 3, § 4, at 23-24. *Accord* Courtney v. Courtney, 184 Okla. 395, 403, 87 P.2d 660, 668 (1938); L. GREEN, *supra* note 529, at 77-99. *Cf. supra* notes 496-97 and accompanying text (response to concerns about integrity of civil justice system, *see supra* note 527).

[541] Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920) (emphasis added), *over-*

5. Alternative Remedies. A final argument to which "no court in this day and age subscribes seriously [is] that the abrogation of marital immunity for tortious injury is 'unnecessary' because redress for the wrong can be obtained through other means."[542] Judges deciding early cases, however, found that immunity should be recognized because married people could secure adequate relief, primarily through criminal litigation and civil actions for divorce.[543] Thus, in 1877, the Maine Supreme Court observed that a "married woman has remedy enough [in] the criminal courts [and] can prosecute at her husband's expense a suit for divorce."[544] Perhaps the most comprehensive description of the idea appears in the majority opinion in *Thompson*:

> Nor is the wife left without remedy . . . . She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court, in protecting her rights and awarding relief in such cases, may consider, and, so far as possible, redress her wrongs and protect her rights.[545]

More recently, the Florida judiciary articulated a variation on the old theme, proclaiming that women intentionally hurt by their spouses during marriage can be awarded compensation in the dissolution decree.[546] By stating that spouses must seek relief under

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ruled, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969). *Accord* cases cited in *supra* note 522.

[542] Merenoff v. Merenoff, 76 N.J. 535, 556, 388 A.2d 951, 962 (1978). *But see* Burns v. Burns, 518 So. 2d 1205, 1213-14 (Miss. 1988) (Griffin, J., dissenting) (subscribing to alternative remedy argument).

[543] Other alternatives are said to be "private sanctions," such as refusing sexual activity. *See Merenoff*, 76 N.J. at 556-57, 388 A.2d at 962. *Cf.* Note, *supra* note 422, at 1655-59 (discussing many related ideas not developed in cases).

[544] Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71, 71 (Me. 1980). *Accord* Peters v. Peters, 156 Cal. 32, 36, 103 P. 219, 221 (1909), *overruled*, Self v. Self, 58 Cal. 2d 683, 684, 376 P.2d 65, 65, 26 Cal. Rptr. 97, 97 (1962); Bandfield v. Bandfield, 117 Mich. 80, 83, 75 N.W. 287, 288 (1898), *overruled*, Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971).

[545] Thompson v. Thompson, 218 U.S. 611, 619 (1910); *accord* Drake v. Drake, 145 Minn. 388, 391, 177 N.W. 624, 625 (1920), *overruled*, Beaudette v. Frana, 285 Minn. 366, 373 n.10, 173 N.W.2d 416, 420 n.10 (1969); Burns v. Burns, 518 So. 2d 1205, 1213-14 (Miss. 1988) (Griffin, J., dissenting); Austin v. Austin, 136 Miss. 61, 72, 100 So. 591, 592 (1924).

[546] *See* Hill v. Hill, 415 So. 2d 20, 21 (Fla. 1982). *Cf.* S.A.V. v. K.G.V., 708 S.W.2d 651, 653 (Mo. 1986); Tevis v. Tevis, 79 N.J. 422, 433-34, 400 A.2d 1189, 1196 (1979) (wife's tort suit

divorce law, so that all disputes between them might be resolved in a single proceeding, the Maine and Florida courts suggest a judicial economy argument.[547] But other jurists say little more, particularly about the sufficiency of the redress available or why spouses should be relegated to the criminal and divorce courts.[548]

The alternative remedies contention can be countered in several ways. The relief ostensibly provided is essentially illusory. Criminal and divorce law might not apply to the challenged behavior. For example, no jurisdiction makes ordinary negligence a crime or a ground for dissolution.[549] Similarly, a majority of states still does not permit prosecution of husbands for rape of their wives.[550] Even if the conduct is covered, many may be unable to pursue the remedy afforded. For example, criminal prosecution would not offer a realistic solution for women who want to continue living with their husbands.[551] For other women, incarceration of the offending spouse could excuse him from providing necessary support to his wife and their children.[552] Moreover, imposition of a fine could deplete already scarce family resources.[553] Divorce also may not be an option for numerous spouses. They could be deterred by religious convictions, economic constraints, the wish to preserve the family unit, or pressures that relatives, friends, and employers can

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relevant to divorce proceeding).

[547] *See* Hill v. Hill, 415 So. 2d 20, 23-24 (Fla. 1982); Abbott v. Abbott, 67 Me. 304, 307 (1877), *overruled*, MacDonald v. MacDonald, 412 A.2d 71, 71 (Me. 1980). *Cf.* Tevis v. Tevis, 79 N.J. 422, 434, 400 A.2d 1189, 1196 (1979) (presenting tort claim in divorce action avoids prolongation and "fractionalization" of litigation). Marital harmony remains paramount for these courts.

[548] These judges also appear troubled primarily about conjugal tranquility. *See, e.g.*, the cases cited in *supra* note 544.

[549] *See* Merenoff v. Merenoff, 76 N.J. 535, 556, 388 A.2d 951, 962 (1978); Hack v. Hack, 495 Pa. 300, 311 n.10, 433 A.2d 859, 864 n.10 (1981); W. PROSSER & W.P. KEETON, *supra* note 2, § 122. *Cf.* Finley, *supra* note 404 (helpful treatment of ideas in this paragraph). Of course, states permitting "no-fault" divorce do not require parties to prove grounds for dissolution. *See, e.g., S.A.V.*, 708 S.W.2d at 653 n.3.

[550] This has changed considerably since 1980. *Compare* Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980) (status then) *with* Note, *supra* note 389, at 1258-62 (current status).

[551] *See* Comment, *Interspousal Tort Immunity—California Follows the Trend*, 36 S. CAL. L. REV. 456, 466 (1963); Comment, *supra* note 447, at 259.

[552] *See* Comment, *supra* note 551, at 466; Comment *supra* note 447 at 259. Although the text accompanying this note is the only specific reference to the alternative remedies' implications for the spouses' children, they apply to much of the remaining analysis.

[553] *See supra* note 430 and accompanying text.

exert.[554]

When married persons can seek an alternative remedy, important types of redress might not be provided. For instance, neither criminal nor divorce law typically permits compensation for damages[555] or affords much deterrence.[556] When a desirable remedy exists, it can be notoriously difficult to secure, as experience with the pervasive problem of conjugal violence illustrates.[557]

Indeed, requiring husbands and wives to pursue redress through criminal and divorce actions may deny them any meaningful relief and, thus, effectively disrupt marital harmony more than allowing tort claims.[558] But even were more satisfactory redress available, the validity of relegating married individuals to alternative remedies is questionable. Very few other classes of potential litigants are similarly constrained.[559] Moreover, constitutions, statutes, or cases in every jurisdiction specifically provide that all persons are entitled to seek redress for tortious harm.[560] It also is difficult to understand why spouses should be restricted to relief that essentially ends the relationship when preservation of marriages is the principal justification for immunity's continued application.[561] Per-

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[554] *See* Comment, *supra* note 551, at 462-63; Comment, *supra* note 447, at 259 (first factor); *supra* note 430 and accompanying text (second factor); *supra* note 450 and accompanying text (divorce statistics).

[555] *See* Mosier v. Carney, 376 Mich. 532, 546-47, 138 N.W.2d 343, 346 (1965); S.A.V. v. K.G.V., 708 S.W.2d 651, 655 (Mo. 1986) (Welliver, J., concurring in part); Kobe v. Kobe, 61 Ohio App. 2d 67, 70-71, 399 N.E.2d 124, 126 (1978). *But see supra* note 546 and accompanying text.

[556] "[Immunity] permitted the wifebeater to practice his twisted frustrations [knowing] any criminal penalty would ordinarily be a modest fine." Coffindaffer v. Coffindaffer, 161 W. Va. 557, 567, 244 S.E.2d 338, 343-44 (1978). Tort law is unlikely to deter spouses who engage in conjugal violence. *See* Marcus, *supra* note 413, at 1661-62; *infra* note 598 and accompanying text. But tort law might help some of the many victims by affording compensatory relief, *see infra* note 573 and accompanying text, or by deterring some wife beating, *see infra* note 568. *Cf.* Courtney v. Courtney, 184 Okla. 395, 401, 87 P.2d 660, 666 (1938); Goode v. Martinis, 58 Wash. 2d 229, 234, 361 P.2d 941, 944 (1961) (alternative relief "may be adequate to prevent future wrongs").

[557] *See* Marcus, *supra* note 413.

[558] *See supra* note 413 and accompanying text.

[559] *Cf. supra* note 450 and accompanying text (litigants' tranquility irrelevant in tort suits between strangers). One class even more constrained is parents and children who injure one another, but immunity as to them apparently is eroding more rapidly than interspousal immunity. *See* F. HARPER, *supra* note 27, at § 8.11; Hollister, *supra* note 11.

[560] *See infra* notes 570-71 and accompanying text.

[561] *See, e.g.*, Mosier v. Carney, 376 Mich. 532, 546, 138 N.W.2d 343, 345-46 (1965); Freehe v. Freehe, 81 Wash. 2d 183, 188, 500 P.2d 771, 775 (1972), *overruled*, Brown v. Brown, 100

haps judges espousing the alternative remedies idea have been attempting to protect conjugal peace by making relief so costly or illusory that no one would seek it.[562]

Thus, this rationale, while one of the first to be enunciated, is now the least convincing.[563] All five of the ideas, however, lack substantiation, are overinclusive, internally inconsistent, contradictory, and ultimately unpersuasive.[564] Yet, these considerations do not mean that the responses to them or the rationales supporting abrogation are completely satisfactory. Those arguments and responses to them are examined next.

B. Reasons for Abolition of Immunity and Responses to Those Reasons

As seen above, numerous courts that eliminated interspousal immunity rationalized this result simply by relying upon the Married Women's Acts or by repudiating the policies enunciated for the doctrine's continuation.[565] Many other judges, however, developed affirmative policy arguments for recognizing interspousal suits. Although these concepts have not always been articulated clearly, the foremost are that abolition would permit the purposes of modern tort law to be realized and the individual rights of women to be

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Wash. 2d 729, 675 P.2d 1207 (1984). *Cf.* Fiedler v. Fiedler, 42 Okla. 124, 126, 140 P. 1022, 1023-24 (1914) (criminal and divorce suits most public, embarrassing and divisive). In states unwilling to abolish immunity totally, permitting intentionally harmed wives to recover compensation upon divorce, *see supra* note 546 and accompanying text, could protect some tenuous marriages, afford compensatory relief, conserve judicial resources, and have some deterrent effect. Of course, divorce is the price of these benefits, and this option might encourage dissolution. *See* Counts v. Counts, 221 Va. 151, 155-56, 266 S.E.2d 895, 897-98 (1980). *Cf.* Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180 (1988) (permitting intentional interspousal tort suit for claim not raised in divorce proceeding).

[562] A few judges mention the relief's illusory nature, *see, e.g.*, Johnson v. Johnson, 201 Ala. 41, 44, 77 So. 335, 338 (1917). Responses to concern about conserving judicial resources, *see supra* note 547, are that important purposes of the judicial system are to afford a "day in court" and to redress injury, *see supra* note 531 and accompanying text. The "private sanctions," mentioned *supra* note 543, simply "do not add up to an enforceable civil right of recovery for damages." Merenoff v. Merenoff, 76 N.J. 535, 557, 388 A.2d 951, 962 (1978).

[563] Rationales other than the five analyzed support immunity, but none has been enunciated as explicitly or as often as those five. *See, e.g., supra* notes 153-55 and accompanying text.

[564] Writers perceptively observe that judges make broader presumptions than factual generalization reasonably supports and depend on superficially pertinent concepts to conceal other policies. *See* McCurdy, *supra* note 3, at 1052-54; Note, *supra* note 422, at 1663.

[565] *See, e.g., supra* notes 245-58 and accompanying text.

vindicated.[566]

1. Tort Law Purposes. The abrogation of immunity facilitates realization of numerous goals of tort jurisprudence. Courts mention occasionally the notion of holding responsible each individual, regardless of marital status, for his or her own harmful conduct.[567] The policies of punishing and deterring injurious interspousal behavior are enunciated less frequently, although they have special significance when harm has been perpetrated intentionally.[568] The principal concern today, however, is providing married people wrongfully hurt by their spouses an opportunity to recover compensation.[569]

A number of judges who rely upon this rationale fail to explain it comprehensively, apparently deeming more expansive treatment unnecessary. Some merely proclaim that an important goal of tort law is to afford anyone harmed by another's blameworthy conduct the chance to pursue monetary relief.[570] Numerous courts cite state

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[566] Courts rarely espouse explicitly ideas on the rights of women, *see infra* notes 590-97 and accompanying text, but concern about such rights may underlie abrogation. Other policies have been developed. For example, some courts advocate that immunities should be retained only for compelling policy reasons. *See* Lewis v. Lewis, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976); Freehe v. Freehe, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984). Others believe that abolition will keep the peace. *See supra* note 261 and accompanying text.

[567] *See, e.g.*, Guffy v. Guffy, 230 Kan. 89, 98, 631 P.2d 646, 651-52 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987); *Lewis*, 370 Mass. at 629, 351 N.E.2d at 532; *Freehe*, 81 Wash. 2d at 191-92, 500 P.2d at 777. *Cf.* Finley, *supra* note 380 (advocating broader "responsibilities" approach).

[568] *See* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 28-29, 33 (encouraging preservation of peace, prevention of cruel acts), *rev'd*, 89 N.Y. 644 (1882); Crowell v. Crowell, 180 N.C. 516, 523, 105 S.E. 206, 210 (1920); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 567, 244 S.E.2d 338, 343-44 (1978) (cases enunciating policies); *supra* note 448; *infra* note 570 and accompanying text (wife battering so ubiquitous as to compel intentional tort suit's recognition if only to offer possible deterrent).

[569] For a classic statement of the compensatory goal, see James, *supra* note 396. *Cf. supra* notes 396-406 and accompanying text (more discussion of goal and its "triumph"). Of course, abolition would facilitate realization of tort law's other generic purposes, such as promoting safety; however, courts rarely mention them. *Cf.* James, *supra* note 396; W. PROSSER & W.P. KEETON, *supra* note 2; M. SHAPO, *supra* note 396, at chs. 3-4, 11 (more discussion of generic purposes); Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 766 (1987) (arguing that torts' primary function should be resolving disputes arising from perceived breaches of important societal norms, not compensation, deterrence or punishment); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) (advocating application of feminist theory to doctrinal tort law); Finley, *supra* note 404 (same).

[570] *See, e.g.*, Lewis v. Lewis, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976); Townsend v.

constitutional or statutory provisions similar to that in the Nebraska constitution: "[A]ll courts shall be open, and every person, for any injury done him in his land, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."[571]

A few judges, refuting the conjugal harmony argument, have contended that allowing spouses to seek reparations can actually promote marital peace because such suits might alleviate the financial burden imposed by harm for which damages otherwise could not be recovered.[572] A smaller number appear to believe that the damage award in a tort case may be the only form of relief available to battered wives.[573]

The compensation concept, however, seems to be premised primarily on the widespread existence of liability insurance. Indeed, some courts candidly rely upon such coverage,[574] although most are less explicit.[575] Judges who adopt the compensation argument because of the availability of insurance apparently think that many married individuals negligently hurt each other and that vehicular or household insurance coverage will pay for most of this damage as well as the defendants' litigation expenses, and thus minimize the potential for connubial discord.[576] A few courts even state that

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Townsend, 708 S.W.2d 646, 647 (Mo. 1986); Rupert v. Stienne, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974); Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986).

[571] NEB. CONST. art. 1, § 13, *cited in* Imig v. March, 203 Neb. 537, 545, 279 N.W.2d 382, 386 (1979). Many judges rely on similar provisions. *See, e.g.*, Brooks v. Robinson, 259 Ind. 16, 24, 284 N.E.2d 794, 798 (1972); Burns v. Burns, 518 So. 2d 1205, 1209 (Miss. 1988); Richard v. Richard, 131 Vt. 98, 106, 300 A.2d 637, 641 (1973). A few judges do not premise the "open courts" idea on constitutional authority. *See, e.g.*, Brown v. Brown, 88 Conn. 42, 49, 89 A. 889, 892 (1914); Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987). Indeed, its origin may be the Magna Carta.

[572] *See, e.g.*, Miller v. Fallon County, 721 P.2d 342, 345 (Mont. 1986); Veazey v. Doremus, 103 N.J. 244, 249, 510 A.2d 1187, 1190 (1986).

[573] *See, e.g.*, Townsend v. Townsend, 708 S.W.2d 646 (Mo. 1986); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 567, 244 S.E.2d 338, 343-44 (1978).

[574] *See, e.g.*, Surratt v. Thompson, 212 Va. 191, 194, 183 S.E.2d 200, 202 (1971); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 566, 244 S.E.2d 338, 343 (1978).

[575] But recent cases are most explicit. *See, e.g., Miller*, 721 P.2d at 345; *Veazey*, 103 N.J. at 249, 510 A.2d at 1190; Shearer v. Shearer, 18 Ohio St. 2d 94, 99-101, 480 N.E.2d 388, 394-95 (1985).

[576] *See, e.g.*, Fernandez v. Romo, 132 Ariz. 447, 449-50, 646 P.2d 878, 881-82 (1982); *Miller*, 721 P.2d at 345; Digby v. Digby, 120 R.I. 299, 304, 388 A.2d 1, 3 (1978). To the extent the compensation idea is premised on insurance, it does not apply to intentional behavior. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 699-700, 376 P.2d 70, 75, 26 Cal. Rptr. 102, 107 (1962). This does not denigrate intentional tort suit; indeed, unavailability of insur-

it is unfair to penalize spouses who have purchased insurance to cover this very eventuality.[577]

There are numerous responses to the idea that permitting interspousal suits facilitates vindication of the compensation goal.[578] One is the contention that providing for recovery in the tort system is unnecessary or unwarranted. Authors of early opinions observed that spouses should forgive one another for harm inflicted wrongfully[579] or that adequate relief could be secured through alternatives to tort litigation, such as divorce.[580] Today, there is widespread insurance coverage for the special damages that negligently harmed spouses incur,[581] while pain and suffering are said to be intangible, difficult to measure, and less appropriate for compensation in this context.[582]

Even when there is substantial need for married individuals to pursue compensation, additional considerations may be more compelling. Allowing husbands and wives to seek monetary damages can threaten conjugal tranquility.[583] In fact, pursuit of an inten-

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ance adds a punitive element to any recovery. *See* Givelber, *supra* note 361, at 54-55; *supra* note 568 and accompanying text.

[577] *See, e.g.*, Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970); Shearer v. Shearer, 18 Ohio St. 3d 94, 101, 480 N.E.2d 388, 395 (1985). *But cf.* Guffy v. Guffy, 230 Kan. 89, 95-96, 631 P.2d 646, 650 (1981) (Prager, J., dissenting), *overruled*, Flagg v. Loy, 241 Kan. 216, 225, 734 P.2d 1183, 1190 (1987) (recovery fair if accident coverage, unfair if liability insurance).

[578] There also are responses to the policies favoring abolition that are not related to tort law's generic purposes or its compensatory goal. *See supra* notes 566-68 and accompanying text. None warrant textual treatment, however, because they consist primarily of the five policies favoring immunity's retention, discussed *supra* notes 419-564 and accompanying text.

[579] *See, e.g.*, the cases cited in *supra* note 148. *But see infra* note 612 and accompanying text. *But cf. supra* note 445 and accompanying text (tort suit can promote harmony by eliminating economic burden).

[580] *See, e.g.*, the cases cited in *supra* notes 543-45. *But see supra* notes 549-58 and accompanying text.

[581] Most spouses have medical insurance and many have wage loss protection. Most homeowners' insurance policies provide some medical coverage, and no-fault automobile benefits are available in numerous states. *See supra* note 398 and accompanying text.

[582] *See* M. SHAPO, *supra* note 396, at 5-176 to 5-183 (discussion of criticisms of pain and suffering damages); Rheinstein, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239, 247-48 (1963) (impropriety in interspousal context). Those spouses least able to afford expenses imposed by negligently caused injury, however, are also least likely to have other coverage. Furthermore, spouses who have coverage are entitled to seek damages because they have paid for coverage. *See supra* note 577 and accompanying text. *Cf.* M. SHAPO, *supra* note 396, at 5-201 to 5-207 (similar idea as to collateral benefits rule).

[583] *See supra* notes 419-37, 448 and accompanying text. *But see supra* notes 438-47, 449-

tional tort action by a battered woman is more likely to end the marital relationship than to provide significant compensation.[584] Permitting personal injury suits could result in frivolous claims as well as excessive litigation.[585] Perhaps most significant, however, is the argument that spouses will collude, undermining familial trust and the integrity of the tort law system.[586] Indeed, judges who subscribe to the compensation rationale on the basis of the prevalence of insurance give credence to the fraud contention.[587] Concomitantly, the allegation that courts allowing suit effectively impose a no-fault compensation system implicates the idea of deference to the legislature.[588]

2. Individual Rights. Few jurists have articulated very explicitly or comprehensively the idea that affording women tort suits facilitates the vindication of their rights.[589] As early as 1920, however, one judge eliminating immunity declared that "wives are no longer chattels [that] need to beg for protection for their persons" but are voters who "can command it."[590] There have been similar pronouncements since then.[591] Some courts have premised abrogation on specific constitutional provisions, such as those entitling tortiously harmed people to seek relief without qualification, especially as to marital status.[592] Similarly, the United States Court of

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56 and accompanying text.

[584] *See infra* note 618 and accompanying text.

[585] *See supra* notes 521-29 and accompanying text. *But see supra* notes 530-41 and accompanying text.

[586] *See supra* notes 457-72, 502-03 and accompanying text (interspousal collusion). *But see supra* notes 473-501 and accompanying text (erosion of familial trust and tort law system).

[587] *See supra* notes 574-77 and accompanying text.

[588] *See supra* note 472 and accompanying text (no-fault allegation); *supra* notes 504-20 and accompanying text (deference).

[589] For helpful analysis of the debate over the efficacy of a rights strategy for women, see C. MACKINNON, *supra* note 448, at 32-45; Finley, *supra* note 380; Freedman, *supra* note 408; Law, *Rethinking Sex and the Constitution* 132 U. PA. L. REV. 955 (1984); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Olsen, *supra* note 411; Note, *supra* note 408. *Cf. infra* notes 614-19 (in tort immunity context).

[590] Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206, 210 (1920). *See also* Schultz v. Schultz, 34 N.Y. Sup. Ct. 26, 33 (earlier allusion), *rev'd*, 89 N.Y. 644 (1882).

[591] *See, e.g.*, Fernandez v. Romo, 132 Ariz. 447, 449-50, 646 P.2d 878, 880-81 (1982); Courtney v. Courtney, 184 Okla. 395, 395, 87 P.2d 660, 660 (1938); Freehe v. Freehe, 81 Wash. 2d 183, 186-87, 500 P.2d 771, 773-74 (1972), *overruled*, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

[592] *See supra* note 571 and accompanying text. *But see* Conley v. Conley, 92 Mont. 425, 425, 15 P.2d 922, 922 (1932), *overruled*, Miller v. Fallon County, 721 P.2d 342 (Mont. 1986);

Appeals for the Seventh Circuit recently invoked the equal protection clause of the fourteenth amendment to invalidate Illinois' statutory proscription of interspousal tort litigation.[593] Although judges are unlikely to acknowledge openly that abolition constitutes state intervention in the family, affording individual rights to certain members against others, these are important consequences of abrogation.[594]

Because so few courts have enunciated expressly or thoroughly the individual rights notion, most judicial responses to the concept have been indirect. Had jurists answered directly, the responses probably would have been couched principally in terms of the marital harmony contention.[595] Even judges who might have been willing to accord females rights in other contexts may have been reluctant to do so within the family. Another response, especially to the equal protection idea, is that a wife should not be afforded a tort cause of action because her husband does not have one against her.[596] Moreover, the notion that abolition involves state intervention in the family to provide wives with rights would offend many jurists.[597]

In summary, these concepts may be somewhat more persuasive than the litany recited for immunity's continued application. Neither set of arguments is compelling, however. Nevertheless, abrogation does at least afford certain benefits in specific situations. It is appropriate, therefore, to analyze some significant consequences of fully abolishing the doctrine.

III. Implications of Total Abolition

Much of the analysis in the initial two Parts of this Article illus-

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Smith v. Smith, 205 Or. 286, 290-97, 287 P.2d 572, 574-77 (1955).

[593] Moran v. Beyer, 734 F.2d 1245, 1245 (7th Cir. 1984). *Accord* Jones v. Jones, 376 S.E.2d 674 (Sup. Ct. Ga. 1989). Burns v. Burns, 518 So. 2d 1205, 1211 (Miss. 1988); Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987). *But see* Williams v. Williams, 108 Ill. App. 3d 936, 936, 439 N.E.2d 1055, 1055 (1982), *modified*, 98 Ill. 2d 128, 455 N.E.2d 1388 (1983); Varholla v. Varholla, 56 Ohio St. 2d 269, 270-71, 383 N.E.2d 888, 889-90 (1978). *Cf.* Paiewonsky v. Paiewonsky, 446 F.2d 178, 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); Smith v. Smith, 240 Pa. Super. 97, 97, 361 A.2d 756, 756 (1976) (rejecting claims premised on due process or equal rights provisions).

[594] *See supra* notes 392-94 & 414 and accompanying text.

[595] *See supra* notes 419-56 and accompanying text.

[596] *See supra* note 156 and accompanying text.

[597] *See supra* notes 415-17 and accompanying text.

trates that courts and legislatures in jurisdictions that retain immunity should eliminate it totally, and complete abrogation is indicated and likely by the turn of the century. Thus, it is important to explore what the ultimate demise of immunity might portend, particularly for the tort law system and for women, wives, marriage, and the family.

A. Implications for the Tort Law System

The impact of complete abolition on the tort law process will be relatively insubstantial, although on balance there will be greater benefit. Elimination of the doctrine will facilitate realization of many tort law goals. When spouses willfully hurt one another, personal injury suits afford possibilities for punishment and deterrence and some likelihood of compensation. Moreover, intentional tort litigation may be the sole relief available to battered wives. Abrogation of negligence immunity provides the opportunity to recover compensatory damages, alleviating the potential economic burden that could be imposed. It also may have some deterrent effect.

Certain purposes of tort law, however, will not be achieved, and there may be detrimental implications for the system. Compensation, deterrence, and punishment are unlikely to be attained in many of the intractable cases of wife battering.[598] Providing access to the courts for interspousal tort disputes will increase the caseload, if only minimally. There will be occasional frivolous or vindictive suits or ones involving the type of interspousal behavior that makes it difficult for trial judges and juries to ascertain whether liability should be imposed.[599] More frequent and more troubling, however, will be situations in which married individuals successfully defraud insurers. Most of these difficulties could undermine public trust in the tort law system, but all are amenable to amelioration.[600]

B. Implications for Society

Abrogation may have numerous salutary effects for women, wives, marriage, and the family. It could enhance the dignity of

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[598] *See supra* notes 555-57 & 568; *infra* notes 604-05 & 618 and accompanying text.

[599] *See supra* notes 521-25 & 528 and accompanying text.

[600] *See supra* notes 481-92 & 538-40 and accompanying text (ameliorative measures).

married people by recognizing that husbands and wives are separate, unique individuals with their own rights which they do not forfeit upon marriage. When the state denies an innocent party hurt by another's blameworthy behavior access to its civil justice system on the basis of marital status, the harmed spouse's full worth as a human may be diminished and that individual's unique, independent identity compromised.[601] Because society expresses respect for people by treating each individual with equal regard,[602] it should extend to every community member the complete panoply of rights accorded all others, including a cause of action for personal injuries suffered.[603]

These considerations have especially telling application to the intentional infliction of harm. Such conduct is morally wrong. It invades the valuable dignity interest in freedom from willful interference with one's person and involves the type of disregard for the integrity of another human that ought to be unacceptable in a civilized society. Moreover, behavior that the community ordinarily considers so reprehensible as to warrant criminalization should not be excused from civil liability.[604] Wife battering is so ubiquitous in the United States as to compel recognition of an intentional tort cause of action, if only to afford one possible means for deterring the heinous conduct.

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[601] Many courts have said that an individual's right to pursue relief in tort should not be denied because of marital status. *See, e.g.*, MacDonald v. MacDonald, 412 A.2d 71, 75 (Me. 1980); Merenoff v. Merenoff, 76 N.J. 535, 557, 388 A.2d 951, 962 (1978); Hack v. Hack, 495 Pa. 300, 303, 433 A.2d 859, 860-61 (1981). Moreover, when the state stamps its imprimatur upon the unequal treatment of any citizen it diminishes the respect of citizens for government. *Cf.* Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO ST. L.J. 546, 552 (1974) (very destructive when judiciary places special imprimatur of legitimacy on symbolism of women's dependency). The government additionally denigrates the injured person by allowing the individual to sue his or her spouse in property or contract, but not in tort. *See* Brooks v. Robinson, 259 Ind. 16, 19-20, 284 N.E.2d 794, 796 (1972); Townsend v. Townsend, 708 S.W.2d 646, 649 (Mo. 1986); Shearer v. Shearer, 18 Ohio St. 3d 94, 97-98, 480 N.E.2d 388, 392-93 (1985). *Cf. supra* note 456 and accompanying text (widespread recognition of interspousal property and contract suits).

[602] Many writers have addressed this idea. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 223-39 (1977).

[603] Most state constitutions provide a right to seek redress for personal injuries. *See supra* note 571 and accompanying text.

[604] Of course, one difficulty in analogizing from criminal to civil law is that certain conduct that is criminal between strangers is not criminal between spouses. *See, e.g., supra* note 550 and accompanying text.

Of course, it is married women who typically are relegated to "second-class citizenship" by application of immunity. In overwhelming numbers, married men commit the intentional torts, especially battering,[605] operate the vehicles in which spouses ride,[606] and are responsible for a significant percentage of household accidents.

Abrogation offers additional benefits that clarify, alter, and even can reverse certain deleterious images of women. By continuing to treat interspousal injury as a private, domestic matter, immunity perpetuates an antiquated world view that considered married individuals as one autonomous unit—the man; wives as property to be managed by their husbands; and such harm the personal business of the head of the household. In contrast abolition allows injurious interspousal activity to become public. It acknowledges the public nature of the harm done to the individual, as well as to family, friends, and society. Abrogation also provides a public forum in which disputes can be aired without resort to force[607] and in which spouses who commit torts can be held accountable for their wrongdoing.[608] Publicity even may deter others from engaging in similar behavior.[609]

In addition to "de-privatizing" injurious conduct between husbands and wives, abolition can modify somewhat family hierarchy by affording rights to both spouses.[610] Moreover, abrogation acknowledges that the altruistic image of wedlock nearly always demanded sacrifice by the wife[611] and that forgiveness, while integral to the institution of marriage, simply is insufficient when serious

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[605] *See* Marcus, *supra* note 413, at 1661-62, 76-77; *supra* notes 156 & 312 (early interspousal tort suits).

[606] In interspousal tort immunity cases involving vehicular collisions reported since 1920, wives comprised more than 75% of the plaintiffs.

[607] *See supra* notes 260 & 443-45 and accompanying text. *Cf.* Olsen, *supra* note 65, at 1529-38, ("de-privitization" and legalization of family); M. SHAPO, *supra* note 396, at 3-16 to 3-20 (tort law as "grievance mechanism"). One problem, of course, is that force already may have been used.

[608] *See supra* notes 567-68 and accompanying text.

[609] *See supra* note 568 and accompanying text. *Cf.* MacKinnon, *supra* note 146, at 656-57 (trenchant analysis of devastating effect the "private" has had on women); *infra* note 613 and accompanying text (abolition could cause intentional interspousal activity to lose social approval). *But see infra* notes 618-19 and accompanying text.

[610] *See* Olsen, *supra* note 65, at 1532.

[611] *See id.* at 1523; *supra* notes 148 & 605-06 and accompanying text.

misbehavior or severe harm is involved.[612] Abolition, therefore, could alter the perception of married women as weaker beings with fewer rights and cause such activities as wife battering and marital rape to lose some of their social approval.[613]

Notwithstanding these benefits, there are disadvantages and limitations. Legalization can endanger family solidarity and altruism by enforcing individual rights against the family.[614] This kind of state intervention equalizes the results of interspousal interaction, but does not democratize the family.[615] It promotes individualism, but particularizes and may legitimate, instead of eliminate, hierarchy.[616] Thus, legalization and intervention, in the context of tort immunity's abolition, may not improve husband-wife or male-female relationships or familial existence, or substantially emancipate or empower married women, but merely serve to perpetuate and justify the status quo.[617] The problem of wife battering illustrates these constraints. Abrogation frees battered women to exercise a right that, if pursued, effectively ends the marriage, is unlikely to provide much compensation in any event, and contributes to the isolation of women.[618] Abolition thus does little to prevent or deter battering in specific instances or in society, and even may

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[612] *See supra* note 148, and accompanying text (forgiveness idea). *Cf.* Marcus, *supra* note 413; Note, *supra* note 408 (insufficiency where wife battering or marital rape).

[613] *See* Olsen, *supra* note 65, at 1529-38. *Cf.* Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (when males prosecuted successfully for rape, men learn that rape is not appropriate behavior).

[614] *See* Minow, *supra* note 9, at 893-94; Olsen, *supra* note 65, at 1530-38. For helpful analyses of limitations entailed in a rights-based approach, see the sources cited in *supra* note 589.

[615] *See* Olsen, *supra* note 65, at 1530-38. *Cf.* Minow, *supra* note 9, at 893-94 (family law measures can liberate individual family members from hierarchical control by one but can also neglect communal life).

[616] *See* Olsen, *supra* note 65, at 1530-38. For helpful analysis of individualization, see C. MACKINNON, *supra* note 146, at 87-90; Note, *supra* note 389, at 1266. For helpful analysis of particularization, see C. MACKINNON, *supra* note 146, at 83-90. For helpful analysis of legitimation, *see id.* at 159-74; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984).

[617] *See* Olsen, *supra* note 65, at 1530-38. *Accord* as to sexual harassment in the workplace, C. MACKINNON, *supra* note 146, at 83-90, 158-61; as to marital rape, Note, *supra* note 408, at 1265-66, 1273.

[618] *See supra* notes 409-16 & 428-29 and accompanying text (ending the marriage). *Cf.* Olsen, *supra* note 65, at 1533 (wives' exercise of rights could isolate or could empower women); C. MACKINNON, *supra* note 146, at 83-90, 158-61 (similar as to sexual harassment).

serve to legitimate the domination experienced by wives who "choose" to remain in marriages in which they are beaten.[619] Indeed, the tort law remedy, by individualizing and personalizing marital rape and wife battering, can obscure the fact that millions of women in bedrooms and homes throughout the nation are raped and beaten by their husbands and, therefore, that this is gender-based discrimination.[620]

Thus, intervention in the family and its legalization and de-privitization, as reflected in abrogation, offer benefits. There are, however, disadvantages, so that the change cannot be accepted without qualifications.[621] Abolition is like similar liberal reforms. It does not affect substantially, and even may deflect consideration of, more fundamental issues within marriage, such as power allocation, and within society, such as how male-female relationships

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[619] *See* Olsen, *supra* note 65; at 1537 ("wife who does not press criminal assault charges against battering husband . . . may be blamed for allowing herself to be a victim" or does not seek divorce "may be said to have consented" to abuse); C. MACKINNON, *supra* note 146, at 83-90, 158-61 (similar to sexual harassment).

[620] Professor MacKinnon incisively explains these ideas in the context of sexual harassment, which explanation is equally applicable to marital rape and wife battering:

> [T]ort is conceptually inadequate to the problem of sexual harassment to the extent that it rips injuries to women's sexuality out of the context of women's social circumstances as a whole. . . . Unsituated in a recognition of the context that keeps women secondary and powerless, sexual injuries appear as incidental or deviant aberrations which arise in one-to-one relationships gone wrong. [Sexual harassment] is not merely a parade of interconnected consequences with the potential for discrete repetition by other individuals . . . . Rather, it is group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared. Such an injury is *in essence* a group injury.

C. MACKINNON, *supra* note 146, at 171-72 (emphasis in original). *Accord* Olsen, *supra* note 411, at 431-32; Note, *supra* note 408.

[621] *See* Olsen, *supra* note 65, at 1559-60; *cf.* Note, *supra* note 408, at 1273 (similar to rights approach to marital rape). *Cf.* C. MACKINNON, *supra* note 146, at 1-7; Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-08 (1984) (extending to women rights that men have fails to develop rights recognizing women's experiences); Schneider, *supra* note 394 (same, and advocating litigation strategy recognizing women's needs); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (advocating truly feminist jurisprudence); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (sameness/differences debate). Professor Finley, *supra* note 380, at 1165 n.198, captures well what these, and many other, writers say in different ways: "[I]t is necessary to analyze the ultimate goal—mere access to male prerogatives, or a more profound change in values, structures, and policies" in treating issues facing women. *Cf. infra* note 623 (discussing numerous approaches).

might be improved.[622] Nevertheless, while work continues on these essential questions, abrogation can afford advantages in specific situations, it can challenge the points at which power affects the daily existence of people, and perhaps it can bring about that incremental adjustment of power which leads to more fundamental change.[623]

Thus, for the tort law system and society, the potential benefits of total abolition outweigh its detrimental aspects. Accordingly, complete abolition is appropriate.

CONCLUSION

Interspousal tort immunity has enjoyed a long, rich history, but the rule is now one of the truly "sick men" of American tort jurisprudence for whom the requiem may soon play. The story of the doctrine affords insights on judicial decisionmaking, tort law development, and societal views of women, marriage, wives and the family. Nonetheless, the demise of immunity is unlikely to empower females, improve significantly their circumstances within the family, or enhance substantially relations between men and women.

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[622] This is an important thesis of Littleton, *supra* note 589; C. MACKINNON, *supra* note 146; Olsen, *supra* note 65; Note, *supra* note 408. *Accord* POLAN, *supra* note 146, at 299-300.

[623] For example, some wives battered during marriage by their husbands may be able to recover compensation after divorce. *Cf.* Note, *supra* note 408, at 1273 (rights approach can attack points at which power affects daily lives of, and take step toward power equality between, men and women). For examples of valuable work on the more important questions, see sources cited in *supra* notes 589 & 621-22.